Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1446

CHARGER INVESTMENTS, INC. D/B/A THE SQUIRE, ET AL.,
APPELLANTS,

v.

GEORGE P. CORBETT, CHIEF OF POLICE, CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

Jurisdictional Statement.

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Supreme Court of the United States.

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No.

CHARGER INVESTMENTS, INC. D/B/A THE SQUIRE, ET AL.,
APPELLANTS,

v.

GEORGE P. CORBETT, CHIEF OF POLICE, CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

Jurisdictional Statement.

The appellants appeal from part of the final judgment after rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts entered on January 21, 1976. The part of the final judgment appealed from reads as follows:

> "2. Article III of Chapter 13 of the Revere Revised Ordinances is not invalid upon its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance."

The appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1975) 3350; 338 N.E. 2d 816. A copy of the rescript and opinion of the Supreme Judicial Court, and of the docket, judgment after rescript, order directing the clerk to correct the record, and of the final judgment after rescript of the Superior Court for Suffolk County are included in the appendix and referenced as (A.).

Jurisdiction.

This suit was brought by the appellants (plaintiffs below) to enjoin the enforcement of a municipal ordinance as unconstitutional. The appellants appeal from part of the final judgment after rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts entered on January 21, 1976. Notice of appeal was filed on March 22, 1976 in the Superior Court for Suffolk County. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257(2). The following cases and decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Sheridan* v. *Gardner*, 379 U.S. 647 (1965) (appeal from Superior Court of Massachusetts, Suffolk County); *Reinman* v. *Little Rock*, 237 U.S. 171 (1915); *Erznoznik* v. *Jacksonville*, 422 U.S. 205 (1975) (municipal ordinance upheld by state

court must be regarded as state law within the meaning of the federal Constitution).

Statutes Involved.

The appellants challenge the constitutionality of the following municipal ordinance: art. III of c. 13 of the Revere Revised Ordinances (A. 23-25). The official edition of this statute may be found at pages 182 *et seq.*, Revere, Massachusetts, Revised Ordinances.

Other statutes involved are Mass. G.L. c. 138, §§ 1, 12, 23, 24, 62, and c. 140, §§ 1, 183A, 183C (A. 57-74).

Question Presented.

"Does the Twenty-first Amendment to the United States Constitution permit a municipal body, not duly authorized under state law to grant, modify, suspend, revoke or cancel a local liquor license, to pass an ordinance barring activities by local liquor licensees at least some of which activities would otherwise be protected by the First and Fourteenth Amendments to the United States Constitution."

Statement of the Case.

Relevant Facts and Proceedings Below.

The instant case was brought by the appellants—a Massachusetts corporation, its manager and one of its entertainer employees—in order to enjoin the appellees, the Police Chief of the city of Revere, Massachusetts and the city of Revere, from enforcing against the appellants a municipal ordinance, Revere Revised Ordinances, c. 13,

art. III, which prohibited, *inter alia*, nude dancing as performed by the appellant entertainer at the direction of the appellant corporation and manager (A. 23-25). The municipal ordinance went into effect on April 3, 1974 and, commencing on or about July 24, 1974, the city of Revere brought multiple prosecutions against the appellants for the alleged violation of said ordinance. On August 21, 1974, the appellants filed a complaint in the Supreme Judicial Court for Suffolk County seeking injunctive relief against the appellees' enforcement of this ordinance (A. 23-25). On September 19, 1974, the Supreme Judicial Court for Suffolk County enjoined the appellees from enforcing this ordinance against the appellants and ordered this action transferred to the Superior Court for Suffolk County for speedy trial (A. 26-27). This matter was transferred to the Superior Court for Suffolk County where it was submitted on an agreed statement of facts (A. 28-31) and briefs. On November 22, 1974, the Supreme Judicial Court for Suffolk County entered a judgment declaring that the ordinance was "invalid and null and void" and permanently enjoining the appellees from enforcing same against the appellants (A. 34-35).

The appellees filed a timely notice of appeal to the Appeals Court of the Commonwealth of Massachusetts, and the Supreme Judicial Court for the Commonwealth of Massachusetts, on March 14, 1975, ordered direct appellate review by it, as the state's highest court, of the judgment of the Superior Court. The Supreme Judicial Court for the Commonwealth, after hearing oral argument on the appeal, issued a rescript and opinion (A. 37-49) on December 3, 1975 vacating the judgment of the Superior Court and ordering that a new judgment be entered in accordance with its opinion. The rescript was filed with the Superior Court for Suffolk County on De-

cember 31, 1975 and, after a hearing to settle the form of the judgment, the Superior Court for Suffolk County entered its final judgment after rescript on January 21, 1976 (A. 53). On March 22, 1976, the appllants filed with the Superior Court for Suffolk County the appellant's notice of appeal to the Supreme Court of the United States (A. 55) and the appellants' request for certification and transmission of the record to the Supreme Court of the United States (A. 54).

How the Federal Question was Presented Below.

The appellants presented the federal question of the constitutionality, under the First and Fourteenth Amendments to the United States Constitution, of Revere Revised Ordinances, c. 13, art. III in its complaint (A. 23-25) and more specifically in par. 10 (A. 20) thereof which reads as follows:

> "10. The Petitioners assert that the production and performance of the dance entertainment, as described in Paragraph 4 above, for a not [un]suspecting or unwilling adult audience, are within the ambit of protection of the First and Fourteenth Amendments of the United States Constitution and Article XVI of the Declaration of Rights of the Massachusetts Constitution and that, accordingly, the multiple prosecutions brought by Respondents against Petitioners have resulted and will continue, if unrestrained by this Honorable Court, to result in an impermissible chilling of Petitioners' constitutional rights."

This question was briefed, on appeal to the Supreme Judicial Court for the Commonwealth, by both the appellants and the appellees.

The Supreme Judicial Court for the Commonwealth held, in its opinion, citing *California* v. *LaRue,* 409 U.S. 109 (1972), that Revere Revised Ordinances, c. 13, art. III was not unconstitutional on its face. Thus the court noted as follows:

> "5. *Constitutional questions.* We read § 13-26 of the ordinance [footnote omitted] as applying only to 'licensed premises' subject to a license 'for the sale of alcoholic beverages to be served and drunk on the licensed premises' as well as to a license 'in accordance with Chapter 140, Sec. 181 or Sec. 183A.' We read § 13-27 as similarly limited, and we read § 13-28 as forbidding nothing which is not forbidden by some law or ordinance other than that section. So read, the ordinance is not unconstitutional on its face. *California* v. *LaRue,* 409 U.S. 109 (1972). See *Boston Licensing Bd.* v. *Alcoholic Beverages Control Comm'n,* Mass. , - (1975) [footnote omitted]. Contrast *Salem Inn, Inc.* v. *Frank,* F. 2d. , (2d Cir. 1975) [footnote omitted]. As in the *Boston Licensing Bd.* case, we think we should not anticipate constitutional and other questions which may arise from particular applications of the ordinance." (A. 45-46; Mass. Adv. Sh. (1975) 3350, 3361; 338 N.E. 2d 816, 821.)

APPEAL FROM THE SUPERIOR COURT FOR SUFFOLK COUNTY TO THE SUPREME COURT OF THE UNITED STATES IS PROPER.

Under Massachusetts rules and case law, litigation in which the Supreme Judicial Court or the Appeals Court has issued a rescript and opinion to the Superior Court is not terminated until a final judgment after rescript has been entered by that court. Mass. Rules of Appellate Procedure Rule 28 (A. 75). See *Boston* v. *Santosuosso,* 308 Mass. 189, 194; 31 N.E. 2d 564 (1941); *Carilli* v. *Hersey,* 303 Mass. 82, 84; 20 N.E. 2d 492 (1939). Further lower court proceedings subsequent to the issuance of a rescript by the Supreme Judicial Court for the Commonwealth or by the Appeals Court may include trial on the merits, *Sheridan* v. *Gardner,* 347 Mass. 8, 20; 196 N.E. 2d 303, 312 (1964); amendment of the pleadings, *Seder* v. *Kozlowski,* 304 Mass. 367, 370; 32 N.E. 2d 880, 881 (1939), and determination by the trial court of the awarding of costs and expenses, *Cape Cod Bank and Trust Company, administrator* v. *Cape Cod Hospital,* Mass. App. Ct. Adv. Sh. (1975) 727, 735; 327 N.E. 2d 902, 906.

Although this Court is not controlled by the designation applied by state practice as to what constitutes "final judgments or decrees" pursuant to 28 U.S.C. § 1257 or its predecessor § 237 of the Judicial Code, 28 U.S.C. § 344, *Cole* v. *Violette,* 319 U.S. 581, 582 (1943), the standard of this Court has been:

> "not to permit an appeal until a litigation has been concluded in the court of first instance. . . . Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 123-124 (1945).

This standard has been recently broadened by this Court, in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-478 (1975), to permit consideration of interlocutory decrees of the highest state court as a "final judgment or decree" for the purposes of 28 U.S.C. § 1257 when

> "additional proceedings anticipated in the lower state courts. . . . would not require the decision of other federal questions . . . *and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' Radio Station WOW, Inc.* v. *Johnson, supra,* at 124 . . ." (emphasis supplied).

Since, in the instant case, the short time period of seven weeks (December 3, 1975 to January 21, 1976) between the issuance of the rescript and opinion by the Supreme Judicial Court for the Commonwealth and the entry of final judgment after rescript by the Superior Court for Suffolk County of the Commonwealth of Massachusetts did not constitute a period so long as to be considered one of 'economic waste and delayed justice,' the instant case does not fall within the exceptions enumerated in *Cox Broadcasting Corp.* v. *Cohn, supra.* Thus the final judgment after rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts should be considered the "final judgment" for the purposes of appeal pursuant to 28 U.S.C. § 1257. See also *Sheridan* v. *Gardner,* 379 U.S. 647 (1965).

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL.

The appellants present the following federal question for consideration by this Court:

> "Does the Twenty-first Amendment to the United States Constitution permit a municipal body, not duly authorized under state law to grant, modify, suspend, revoke or cancel a local liquor license, to pass an ordinance barring activities by local liquor licensees at least some of which activities would otherwise be protected by the First and Fourteenth Amendments to the United States Constitution."

In *California* v. *LaRue,* 409 U.S. 109 (1972), this Court upheld the authority of a state administrative agency "with primary authority for the licensing of the sale of alcoholic beverages . . . . [to promulgate] rules regulating the type of entertainment that might be presented in bars and nightclubs that it licensed" (*LaRue,* 409 U.S. 109, 110). The appellees in *LaRue* challenged, as do the appellants here, the constitutionality of these regulations on their face. See also *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35 (1966); *Goguen* v. *Smith,* 471 F. 2d 88, 93 (1st Cir. 1972). The *LaRue* regulations were upheld by this Court on the grounds that the Twenty-first Amendment conferred upon a state regulatory agency, "in a context of licensing bars and nightclubs to sell liquor by the drink . . . . more than the normal state authority over public health, welfare, and morals." *LaRue,* 409 U.S. 109, 114. Thus " 'performances' that partake more of gross sexuality than of communication," *LaRue,* 409 U.S. 109, 118, could be prohibited in licensed bars or nightclubs without offending the constitutional "interests protected by the First and Fourteenth Amendments," *LaRue, ibid.* Succeeding federal and state cases have followed *LaRue* in holding that similar regulations may be considered constitutional, in light of the "broad sweep" of the Twenty-first Amendment, *if passed by state* or *municipal authorities authorized under state law to regulate the liquor licenses of the establishments whose activities are being made subject to LaRue type controls.* See *Paladino* v. *Omaha,* 471 F. 2d 812, 814 (8th Cir. 1972); *Oberhelman* v. *Schultze,* 371 F. Supp. 1089, 1090 (D. Minn. 1974); affd. 505 F. 2d 736 (8th Cir. 1974); *Manos* v. *Green Bay,* 372 F. Supp. 40, 42, 45-46 (E.D. Wis. 1974); *Cheetah Enterprises, Inc.* v. *County of Lake,* 22 Ill. App. 3d 306; 317 N.E. 2d 129, 132 (1974).

In the instant case, the appellants contend and the Supreme Judicial Court for the Commonwealth conceded that the city council of the appellee city of Revere, which passed the *LaRue* type ordinance at issue, had no authority to "make provision for the modification, suspension, revocation or cancellation of any [liquor] license" (*Revere* v. *Aucella*, Mass. Adv. Sh. (1975) 3350, 3359-3360, 338 N.E. 2d 816, 821) (A. 45), since such authority resided, pursuant to state statute (Mass. G.L. c. 138, §§ 1, 12, 23; Mass. G.L. c. 140, §§ 1, 183A), only with the state Alcoholic Beverages Control Commission or the local licensing board. *Revere* v. *Aucella*, Mass. Adv. Sh. (1975) 3350, 3358; 338 N.E. 2d 816, 820 (A. 43). See also *Boston Licensing Board* v. *Alcoholic Beverages Control Commission*, Mass. Adv. Sh. (1975) 1608; 328 N.E. 2d 848. The Supreme Judicial Court for the Commonwealth, however, upheld the authority of the Revere City Council to promulgate a *LaRue* type regulation on the twin grounds that state statutes did not "preempt the matter as an area of complete state concern" and that "[t]he municipal authorities other than the licensing board are not barred from dealing with 'the maintenance of the peace and good order' in the city even though statutory provision exists for some matters within the purview of the ordinance." *Revere* v. *Aucella*, Mass. Adv. Sh. (1975) 3350, 3359, 3360; 338 N.E. 2d 816, 820-821 (A. 44, 45). As such, and restricting the application of the ordinance to the premises of liquor licensees, the Supreme Judicial Court for the Commonwealth held:

> "So read, the ordinance is not unconstitutional on its face. *California* v. *LaRue*, 409 U.S. 109 (1972). . . ." Mass. Adv. Sh. (1975) 3350, 3361; 338 N.E. 2d 816, 821 (A. 45).

Pursuant to this logic, other municipal bodies without statutory authorization to regulate liquor but interested in the maintenance of "peace and good order" could promulgate similar regulations. Thus considerations of health, structural and fire hazards could lead the local health, building and fire departments to pass similar regulations as a condition of a bar or nightclub securing municipal approval for their activities from such agencies. Such a result would invite prior restraint on First Amendment protected activities far beyond the exception authorized by *LaRue*.

It should be further noted that the appellants failed to allege the existence of any "bacchanalian revelries," the prevention of which is viewed by this Court as the primary rationale for the issuance of *LaRue* type ordinances, *California* v. *LaRue*, 409 U.S. 109, 118, so that, for this further reason, the promulgation of the Revere ordinance (A. 23-25) is not supported by *California* v. *LaRue, ibid.*

It is submitted that the Supreme Judicial Court's sanctioning, in the instant case, of the promulgating by a municipal body *without statutory power to regulate liquor licensing* of a *LaRue* type regulation for local liquor licensees is against the holding in *LaRue* v. *California, op. cit.*, and is unsupported by any reading of the Twenty-first Amendment. Further, the appellants argue, such an authorization, if allowed to stand, will tend to destroy the delicate balance between state authority to regulate liquor licensees pursuant to the Twenty-first Amendment and individual rights to freedom of expression and due process under the First and Fourteenth Amendments. See *California* v. *LaRue*, 409 U.S. 109, 120 *et seq.* As such, the appellants believe that the ques-

tion presented by this appeal is substantial and of great public importance.

Respectfully submitted,

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Docket.

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE ET ALS

vs.

GEORGE CORBETT, CHIEF OF POLICE
OF THE CITY OF REVERE ET AL.

Plaintiffs—E. Gregory Sees, Julie Biesterfeld
Plaintiff's Counsel—Morris M. Goldings, Mahoney, Atwood & Goldings, 500 Boylston St., Boston,
Defendants—City of Revere
Defendant's Counsel—Vincent A. Canavan, City Solicitor (for defts) City Hall, Broadway, Revere, Mass.
Action—Equitable Relief
to be tried with # 774

Date	No.	Entered
1974		
Sept. 17		Transferred from Supreme Judicial Court.
	1	Complaint.
	—	Order of notice issued ret'ble Wednesday, Sept. 11, 1974 at 9:30 a.m. in the Full Court.
	—	Summons issued.
	2	Summons served on George Corbett returned with service endorsed thereon.
	3	Summons served on the City of Revere returned with service endorsed thereon.
	4	Order of notice returned with service endorsed thereon.
	5	Defendants' motion to dismiss.
	6	Defendants' answer and counterclaim.
	7	Defendants' counter-affidavit to plaintiffs' affidavit in support of plaintiffs' complaint.

		8	Defendants' memorandum of law in opposition to issuance of a preliminary injunction.
		9	Memorandum and order, (see paragraph 3 for Order transferring from Supreme Judicial Court to Suffolk Superior Civil Court.
Sept.	24	10	Plaintiffs' reply to counterclaim.
Sept.	30	11	Motion of plaintiffs to consolidate Superior Civil Court No. 774 with this action, and assented to.
Oct.	3	11a	Statement of agreed facts.
Nov.	8	12	FINDINGS, RULINGS AND ORDER FOR JUDGMENT, Brogna, J. Notice sent.
Nov.	22	13	JUDGMENT: entered on Docket pursuant to the provisions of Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to the provisions of Mass. R. Civ. P. 77(d).
Dec.	10	14	Defts. Notice of Appeal.
Dec.	17	—	Notice of service of Notice of Appeal to Messers Mahoney, Atwood and Goldings.
			1975
Jan.	29	—	Notice record on appeal assembled.
Feb.	14	—	Copy of Motion filed by Appellants in Appeals Court to enlarge time for Designation under MRAP (18b).
Feb.	14	15	Appellants' Designation of the Contents of the Record Appendix & statement of Issues.
Mar.	14	—	Copy of order entered in SJC allowing application for direct appellate review
Dec.	31	—	Rescript from S.J.C. ORDERED "THE Judgment dismissing the City's action with prejudice is affirmed. The Judgment in Charger's action is vacated & the case is

remanded to the Superior Court, where a new Judgment is to be entered in accordance with the opinion" (see P#17 in #774).

1976

Jan.	9	16	JUDGMENT AFTER RESCRIPT (PURSUANT TO MASS.R.A.P.28); (1) the wording of G.L. c. 272, § 16, reading "who is guilty of open and gross lewdness and lascivious behavior," is unconstitutional where there is no imposition of the behavior on an unsuspecting or unwilling person: (2) art. 3 of c. 13 of the Revere Revised Ordinances is not invalid on its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance, and (3) defendents [sic] are enjoined from arresting or prosecuting the plaintiffs or the employees of Charger for violation of G.L. c. 272, § 16, in circumstances in which the statute has thus been declared unconstitutional; entered on docket pursuant to Mass.R.Civ.P. 58(b) and notice sent to parties pursuant to Mass.R.Civ.P. 77(d).
Jan.	20	17	ORDER directing clerk to correct the record. (McNaught, J.)
Jan.	21	18	FINAL JUDGMENT AFTER RESCRIPT: 1. The wording of G. L. c. 272 § 16 reading "who is guilty of open and gross lewdness and lascivious behavior", is unconstitutional where there is no imposition of the behavior on an unsuspecting or unwilling person.

2. Article III of Chapter 13 of the Revere Revised Ordinances is not invalid upon its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance.

3. The Defendants are enjoined from arresting or prosecuting the Plaintiffs or the employees of Charger Investments, Inc. for violation of G.L.c. 272 §16 in circumstances in which the statute has thus been declared unconstitutional., entered on Docket pursuant to the provisions of Mass. R. Civ. P. 58(b) and notice sent to parties pursuant to provisions of Mass. R. Civ. P. 77(d).

Jan. 21 19 Mo. of plffs. for partial stay of judgment. Mo. denied 12/17/75, Brogna, J. (see order re: correcting of record dated 1/20/76.

Mar. 22 20 Appellant's request for certification & transmission of the record to the Supreme Court of the United States.

Mar. 22 21 Appellants notice of appeal to the Supreme Court of the United States.

I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS: SUPREME JUDICIAL COURT
CIVIL ACTION NO. 1786

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE; E. GREGORY SEES;
AND JULIE BIESTERFELD,
Petitioners
V.
GEORGE CORBETT as he is the CHIEF
OF POLICE of the CITY OF REVERE; AND
CITY OF REVERE,
Respondents.

Sep. 17, 1974

COMPLAINT

Morris M. Goldings
MAHONEY, ATWOOD & GOLDINGS
500 Boylston Street
Boston, Massachusetts 02116
(617) 261-2300

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS: SUPREME JUDICIAL COURT
CIVIL ACTION NO. J-74-53

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE; E. GREGORY SEES;
AND JULIE BIESTERFELD,
Petitioners
V.
GEORGE CORBETT as he is the CHIEF
OF POLICE of the CITY OF REVERE; AND
CITY OF REVERE,
Respondents.

COMPLAINT

To the Honorable Justices of the Supreme Judicial Court:

Now come the Petitioners and allege as follows:

1. Petitioner Charger Investments, Inc., a corporation duly organized under the laws of the Commonwealth of Massachusetts and d/b/a The Squire, is the holder of an entertainment license issued by the Licensing Board of the City of Revere for the year 1974 issued pursuant to G.L. c. 140 § 183A and of a common victualler's license and an all alcoholic beverage license issued pursuant to G.L. c. 138 for the premises at 604 Squire Road, Revere, Massachusetts, which premises are owned by the Estate of Alfonso Aucella, late of Revere, Massachusetts.

2. Petitioner E. Gregory Sees is Manager of said Charger Investments, Inc., d/b/a The Squire and is in charge of the production of the dance entertainment referred to herein.

3. Petitioner Julie Biesterfeld is an entertainer employed by Petitioner Charger Investments, Inc. at the premises at 604 Squire Road, Revere, Massachusetts.

4. Respondent George Corbett is the Chief of Police of the City of Revere. Respondent City of Revere is a municipal corporation duly organized by law and having a usual place of business in Revere, Suffolk County, Commonwealth of Massachusetts.

5. Since 1973, Petitioner Charger Investments, Inc. has presented, as entertainment for the patrons at The Squire, individual female dancers who perform to the accompaniment of music both from phonograph records and a live band of four members. Petitioner Julie Biesterfeld is one such performer. As part of the performance, each dancer, including Biesterfeld, removes her clothing while

dancing with the result that for some period of time the performer dances while dressed only in a transparent negligee or other scant attire. At no time do the entertainers perform together in proximity with each other and at no time do they perform or simulate any sexual conduct. The patrons of the Petitioner Charger Investments, Inc. are all non-minors, are charged no admission or cover charge, and are free to leave at any time during any performance without charge other than for the food or drink consumed. The outside of the premises bears the word "Entertainers" and the silhouette of a dancing girl so that prospective patrons are generally aware, without intrusive pandering of the activities inside, of the general nature of the entertainment.

6. From on or about July 24, 1974 to the time of the bringing of this Complaint, the Respondent City of Revere has brought multiple prosecutions (including Chelsea District Court Nos. 3087, 3184, 3185, 3596, 3597, 3964, 3965, 3966, 3967, 3968, 3969, 3970 and related cases) in the District Court of Chelsea for alleged violations of a new Article III of Chapter [13] of the Revere Ordinance entitled "Attire and Conduct of Employees, Entertainers and Other Persons" (See Exhibit 1). These prosecutions have resulted in conviction of the manager and assistant managers, including the Petitioner Sees in his former capacity as an assistant manager, of the Petitioner Charger Investments, Inc., which convictions have been appealed and are pending in Suffolk Superior Court.

7. On July 29, 1974 the Respondent City of Revere commenced a civil action in the Suffolk Superior Court (No. 744) seeking a preliminary injunction to enjoin Petitioner Charger Investments, Inc. from using its premises "for the purpose of conducting nude shows and/or simulate sex acts" as defined in Exhibit 1. On August 5,

1974 the Superior Court, after hearing, denied the Respondent's City of Revere's application for a preliminary injunction. The case on the merits is pending in that Court.

8. On July 16, 1974 the Respondent brought or caused to be brought criminal complaints against certain female entertainers, including the Petitioner Julie Biesterfeld, employed by the Petitioner Charger Investments, Inc. for violation of G.L. c. 272 § 16. Two such cases, Chelsea District Court Nos. 4938 and 4939, were tried and resulted in continuance without findings until October 28, 1974. The remaining cases, including Chelsea District Court Nos. 5768, 5770, and 5771 are scheduled to be tried on September 9, 1974.

9. The Respondent Chief Corbett has stated his intention to continue to seek complaints under G.L. c. 272 § 16 against any entertainers employed by Petitioner Charger Investments, Inc. who perform while partially or totally unclad, as described in Paragraph 4 above.

10. The Petitioners assert that the production and performance of the dance entertainment, as described in Paragraph 4 above, for a not [un]suspecting or unwilling adult audience, are within the ambit of protection of the First and Fourteenth Amendments of the United States Constitution and Article XVI of the Declaration of Rights of the Massachusetts Constitution and that, accordingly, the multiple prosecutions brought by Respondents against Petitioners have resulted and will continue, if unrestrained by this Honorable Court, to result in an impermissible chilling of Petitioners' constitutional rights.

11. The Petitioners assert that the term "open and gross lewdness and lascivious behavior" specified in G.L. c. 272 § 16 is unconstitutionally vague and overbroad when applied to activity protected by the First and Four-

teenth Amendments of the United States Constitution and by Article XVI of the Massachusetts Constitution and that, accordingly, any present or future prosecution by Respondents of Petitioners under G.L. c. 272 § 16 should be enjoined by this Honorable Court by reason of the facial unconstitutionality of G.L. c. 272 § 16.

12. Further, the Petitioners assert that the dance performances in question are not "obscene" as defined in G.L. c. 272 § 31, as amended by St. 1974, c. 430, as said performances, taken as a whole, do not appeal to the prurient interest of the average person, do not depict or described sexual conduct in a patently offensive way, and do not lack serious artistic value.

13. Further, Petitioners assert that, in addition to the constitutional infirmities of G.L. c. 272 § 16 which should invite this Honorable Court's attention, the efficient administration of justice would be best served by enjoining the present and potential future multiple prosecutions of the Petitioners by the Defendants, including those now pending in the Chelsea District Court and the Suffolk Superior Court, pending a decision on the merits by this Honorable Court on the constitutionality of G.L. c. 272 § 16.

14. Without injunctive relief from this Honorable Court, the Petitioners will not be able to provide or engage in performances of partially or totally unclad dancing without threat of continued harassment, arrest, prosecution and great financial and other damage.

15. The Petitioners have no plain and adequat remedy at law.

WHEREFORE, Your Petitioners pray:

1. That a short order of notice issue to the Respondents George Corbett and the City of Revere for a hearing on whether a preliminary injunction should issue in this matter.

2. That, after hearing, a preliminary injunction issue against the said Respondents, George Corbett as he is Chief of Police of the City of Revere and the City of Revere to enjoin said Respondents from arresting, complaining of and harassing or otherwise interfering with persons performing or arranging the performance of dancing at the premises of the Petitioner Charger Investments, Inc., d/b/a The Squire.

3. That, after a trial on the merits, a permanent injunction issue against the said Respondents, George Corbett as he is the Chief of Police of the City of Revere and the City of Revere to enjoin said Respondents from arresting, complaining of and harassing or otherwise interfering with persons performing or arranging the performance of dancing at the premises of the Petitioner Charger Investments, Inc., d/b/a The Squire.

4. For such other relief as to this Honorable Court may seem equitable and just.

By their Attorney,
Morris M. Goldings
Mahoney, Atwood & Goldings
500 Boylston Street
Boston, Massachusetts 02116
(617) 261-2300

I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk

Suffolk S.S. Supreme Judicial Court
FILED Aug. 21, 1974 John E. Powers, clerk

"Exhibit 1"

When replying please refer to
c.o. No. 134

CITY OF REVERE
Massachusetts

CITY COUNCIL
City Hall

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF REVERE, AS FOLLOWS:

That Chapter 13 of the Revised Ordinances be amended by adding at the end thereof the following:

ARTICLE III Attire and Conduct of Employees, Entertainers, and Other Persons

Sec. 13-26 RULES

The following acts or conduct in or on premises licensed in accordance with Chapter 140, Sec. 181 or Sec. 183A are deemed contrary to the public need and to the common good and therefore no license shall be held for the sale of alcoholic beverages to be served and drunk on the licensed premises where such acts or conduct are permitted.

(a) It is forbidden to employ or permit any person in or on the licensed premises while such person is unclothed or in such attire as to expose to view any portion of the areola of the female breast or any portion of the pubic hair, cleft of the buttocks, or genitals.

(b) It is forbidden to employ or permit any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire as described in paragraph A above.

(c) It is forbidden to encourage or permit any person in or on the licensed premises to touch, caress, or fondle the breasts, buttocks, or genitals of any other person.

(d) It is forbidden to employ or permit any person to wear or use any device or covering exposed to view which simulate the breasts, buttocks, pubic hear [sic], or genitals or any portions thereof.

(e) It is forbidden to employ or permit any person in or on the licensed premises to perform an act or acts, or to simulate the act or acts, of:

1. sexual intercourse, masturbation, sodomy, flagellation, or any sexual acts prohibited by law; or
2. touching, caressing, or fondling of the breasts, buttocks, or genitals of another.

Sec. 13-27 VISUAL DISPLAYS

It is forbidden to employ or permit any person in or on the licensed premises to show motion picture films, television type cassettes, still pictures, or other photographic reproductions depicting any of the acts, or any simulation of any of the acts, prohibited in part 1 of these ordinances.

Sec. 13-28 OTHER LAWS

Notwithstanding any of the foregoing ordinances, no person duly licensed by the Licensing Board for the City of Revere under G.L. c. 140, section 181 or 183A and/or c. 138, sections 1, 12 or 23 shall employ, use the services of, or permit upon his licensed premises any employee, entertainer, or other person who by his or her attire or conduct violates any General Laws, Special Act, or Ordinance of the City of Revere.

Sec. 13-29 EFFECTIVE DATE

The foregoing amendments shall take effect on March 15, 1974.

In City Council March 11, 1974
ORDERED accepted, adopted, engrossed and ordained under the suspension of rules, on a third and final reading on a Roll Call: President O'Hara, Councillors, Colella, Dobbyn, Dubchansky, Edwards, Hurley, Nigro, O'Brien and Tentindo voting "YES", Councillor Ciarlone voting "NO", Councillor DiCarlo voting "PRESENT".
Attest: Joseph F. McChristal, City Clerk
APPROVED by Mayor William G. Reinstein March 28, 1974.
Attest:
[Illegible.]
City Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPREME JUDICIAL COURT
CIVIL ACTION NO.

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE; E. GREGORY SEES;
AND JULIE BIESTERFELD
Petitioners
V.
GEORGE CORBETT, CHIEF OF POLICE,
CITY OF REVERE; AND CITY OF
REVERE
Respondents

AFFIDAVIT IN SUPPORT
OF PETITIONERS' COMPLAINT

Now comes Morris M. Goldings, Attorney for the Petitioners in the above-entitled action and, in support of the Petitioners' Complaint says:

1. That on Friday, August 16, 1974, he talked with Vincent Canavan, City Solicitor, City of Revere who indicated that he understood that it was the current and continuing policy of Respondents Chief George Corbett of the Revere Police Department and of the City of Revere to seek criminal complaints under G.L. c. 272 § 16 against any of the Petitioners or employees of Petitioner Charger Investments, Inc. who performed partially or totally unclad dancing at the premises known as The Squire.

2. That at any hearing held before this Court to consider the issuance of a preliminary injunction, Petitioners will produce further evidence of Respondents' intent to continue to bring criminal complaints under G.L. c. 272 § 16 against Petitioners or employees of the Petitioner Charger Investments, Inc. who perform partially or totally unclad dancing at the premises known as The Squire.

Sworn under the pains and penalties of perjury this 20th day of August 1974.

Morris M. Goldings

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

No. J 74-53 CIV

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE; E. GREGORY SEES;
and JULIE BIESTERFELD

vs.

GEORGE CORBETT as he is the
CHIEF OF POLICE OF THE CITY OF REVERE;
and CITY OF REVERE

MEMORANDUM AND ORDER

It appears that multiple arrests have been made and multiple prosecutions commenced under the Revere ordi-

nance and the "lewdness" statute, and further arrests and prosecutions are threatened. As serious questions are raised with regard to the meaning and constitutionality of the ordinance and statute, it is appropriate to halt by injunction further arrests and prosecutions pending speedy determination of the material questions. This will not prevent later arrests and prosecutions for offences committed while the injunction was outstanding, if it should be determined that the ordinance or statute can be constitutionally applied.

Accordingly, it is

ORDERED

(1) That the defendants be and they hereby are restrained and enjoined from arresting or prosecuting the plaintiffs herein or employees of the plaintiff Charger Investments, Inc. for violation of Chapter 13, Article III, section 13-26 of the Revised Ordinances of the City of Revere, or G.L. c. 272, section 16, in respect to entertainments at the premises of the plaintiff corporation;

(2) That the foregoing injunction shall remain in force until vacated or appropriately modified by the Superior Court (to which the action is being transferred), and it shall be a ground for vacating the injunction that the plaintiffs fail to cooperate in securing speedy trial and disposition of the action;

(3) That the action be and it hereby is transferred to the Superior Court; and

(4) That the foregoing order is without prejudice to the rights of the defendants, in case the injunction is vacated or appropriately modified, thereafter to arrest or prosecute the plaintiffs and employees of the plaintiff corporation for acts alleged to violate the ordinance or statute committed by them while the injunction remained in force.

/s/ Benjamin Kaplan
Justice, Supreme Judicial Court

September 17, 1974
A true copy.
Attest:
September 17, 1974

John E. Powers
Clerk

I delivered the papers to Michael Donovan in the office of Thomas Dorgan, Clerk of the Superior Court for Civil Business.

Joseph F. Toomey

11a

1786

Charger Investments, Inc. d/b/a
The Squire, Et als
Vs.
George Corbett, Chief of Police of the
City of Revere, Et Al.

Statement of agreed facts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 1786

CHARGER INVESTMENTS, INC. d/b/a
THE SQUIRE; E. GREGORY SEES;
AND JULIE BIESTERFELD
VS.
GEORGE P. CORBETT, as he is
CHIEF OF POLICE of the CITY OF REVERE;
and CITY OF REVERE

STATEMENT OF AGREED FACTS

Now come the Plaintiffs and the Defendants in the above-entitled cause of action and stipulate, by their attorneys, to the following facts:

1. Plaintiff Charger Investments, Inc., a corporation duly organized under the laws of the Commonwealth of Massachusetts and d/b/a The Squire, is the holder of an entertainment license issued by the Licensing Board of the City of Revere for the year 1974 issued pursuant to G.L. c. 140 § 183 A and of a common victualler's license and an all alcoholic beverage license issued pursuant to G.L. c. 138 for the premises at 604 Squire Road, Revere, Massachusetts, which premises are owned by the Estate of Alfonso Aucella, late of Revere, Massachusetts, and that said premises are operated by the Plaintiff Charger Investments, Inc.

2. Plaintiff E. Gregory Sees is Manager of said Charger Investments, Inc., d/b/a The Squire and is in charge of the production of the dance entertainment referred to herein.

3. Plaintiff Julie Biesterfeld is an entertainer employed by Plaintiff Charger Investments, Inc. at the premises at 604 Squire Road, Revere, Massachusetts.

4. Defendant George Corbett is the Chief of Police of the City of Revere. Defendant City of Revere is a municipal corporation duly organized by and having a usual place of business in Revere, Suffolk County, Commonwealth of Massachusetts.

5. Since 1973, Plaintiff Charger Investments, Inc., and to the date of this complaint has presented, as entertainment for the patrons at The Squire, individual female dancers who perform to the accompaniment of rock and roll music both from phonograph records and a live band of four members. Plaintiff Julie Biesterfeld is one such

performer. As part of the performance, each of the employee dancers, including Biesterfeld, removes her clothing while dancing with the result that she is completely unclothed so as to expose to view of the customer-consumers of alcholic [sic] beverages all, or portions of the areolas of the female breasts, pubic hair, cleft of the buttock and genitals; at no time do the entertainers perform together in proximity with each other. The patrons of the Plaintiff Charger Investments, Inc., are charged no admission or cover charge, and are free to leave at any time during any performance without charge other than for the food or drink consumed. A sign located outside the premises bears the word "Entertainers" and the silhouette of a dancing girl so that prospective patrons are aware that the entertainment features dancing girls.

6. From on or about July 24, 1974 to the time of the bringing of the Complaint in S.J.C. No. 74-53, the Defendant City of Revere has brought multiple prosecutions (including Chelsea District Court Nos. 3087, 3184, 3185, 3596, 3597, 3964, 3965, 3966, 3967, 3968, 3969, 3970, and related cases) in the District Court of Chelsea for alleged violations of a new Article III of Chapter 13 of the Revere Ordinance entitled "Attire and Conduct of Employees, Entertainers and Other Persons" (See Exhibit 1). These prosecutions have resulted in conviction of the manager and assistant managers, including the Plaintiff Sees in his former capacity as an assistant manager, of the Plaintiff Charger Investments, Inc., which convictions have been appealed and are pending in Suffolk Superior Court.

7. On July 16, 1974 the Defendant brought or caused to be brought criminal complaints against certain female entertainers, including the Plaintiff Julie Biesterfeld, employed by the Plaintiff Charger Investments, Inc., for

violation of G.L. c. 272 § 16. Two such cases, Chelsea District Court Nos. 4938 and 4939, were tried and resulted in continuance without findings until October 28, 1974. The remaining such cases, including Chelsea District Court Nos. 5768, 5700 and 5771 have been continued to October 18, 1974.

8. The City of Revere has an ordinance under Section 1-6 of the Revised Ordinances as to Severability and which is Exhibit 2. This ordinance has been in effect from August 1, 1971 and is still in effect.

9. The City of Revere has an ordinance being Section 1-7 in regard to penalties for violation of ordinance which is Exhibit 3, and has been in effect from August 1, 1971 and is still in effect.

By their Attorneys,
Morris M. Goldings, Attorney for the Plaintiffs
Herbert D. Friedman, Attorney for the Plaintiffs
500 Boylston Street, Boston, Massachusetts 02116
(617) 261-2300

Vincent A. Canavan, Attorney for the Defendants
City Solicitor, City of Revere
Revere, Massachusetts 02151

Filed Oct. 3, 1974 Francis T. Foley

Exhibit 1

The text of Exhibit 1 (Revere Revised Ordinances c. 13, art. III) appears at pages 23-25, *supra.*

A TRUE COPY ATTEST: [Illegible.] CITY CLERK

I hereby certify that there has not been any amendments to the above ordinance since March 11, 1974.

Attest: City Clerk

Exhibit 2

Sec. 1-6. Severability.[1]

It is hereby declared to be the intention of the city council that the sections, paragraphs, sentences, clauses and phrases of this volume are severable, and if any phrase, clause, sentence, paragraph or section of this volume shall be declared invalid or unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this volume, since the same would have been enacted by the city council without the incorporation in this volume of any such invalid or unconstitutional phrase, clause, sentence, paragraph or section. (R. D. 1953, § 1-5.)

Exhibit 3

Sec. 1-7. General penalty.[2]

Whoever violates a provision of any ordinance, whether of these Revised Ordinances or any other ordinance hereafter enacted, shall, unless otherwise provided by law or ordinance, be liable to a penalty of not more than fifty dollars for each offense.

Except where otherwise specifically provided, each day any violation of any provision of these Revised Ordinances or any other such ordinance shall continue shall

[1] For case as to partial invalidity of ordinances, see Goldstein v. Conner, 212 Mass. 57, 98 N. E. 701; see also, Kilgour v. Gratto, 224 Mass. 78, 112 N. E. 489; Commonwealth v. Maletsky, 203 Mass. 241, 89 N. E. 245.

[2] For law of the Commonwealth authorizing city to impose penalties not to exceed fifty dollars, see G.L., C. 40, § 21.

constitute a separate offense. (R. O. 1953, § 1-6; 11-14-66.)

Sec. 1-8. Fines and penalties to inure to use of city.[3]

All fines and penalties for the violation of any ordinance or any order of the city council shall, when recovered, inure.

A TRUE COPY ATTEST
[Illegible.]
CITY CLERK

13
#1786

CHARGER INVESTMENTS, INC. D/B/A
et al
vs.
GEORGE CORBETT, CHIEF OF POLICE OF THE CITY OF REVERE, ET AL

JUDGMENT

JUDGMENT ENTERED ON DOCKET NOVEMBER 22 1974 PURSUANT TO THE PROVISIONS OF MASS.R. CIV.P. 58(a) AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P 77(d) AS FOLLOWS:
11/22/74
M.A. & G
M MG
V. AC.
I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original

[3] As to disposition of money received by officers and boards, see § 2-2 of this Revision.

on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
NO. 1786

CHARGER INVESTMENTS, INC., d/b/a
THE SQUIRE; E. GREGORY SEES;
JULIE BIESTERFELD

V.

GEORGE P. CORBETT, CHIEF OF POLICE
OF THE CITY OF REVERE and
THE CITY OF REVERE

JUDGMENT

This action came on for trial before this Court, Brogna, J., presiding, the issues having been duly tried and findings, rulings and orders for judgment having been duly rendered,

It is Ordered and Adjudged,

1. That the wording of G.L. c. 272, § 16, reading "who is guilty of open and gross lewdness and lascivious behavior" is unconstitutional.

2. That Article III of Chapter 13 of the Revere Revised Ordinances is invalid and null and void.

3. That the Chief of Police of the City of Revere and the City of Revere are restrained and enjoined from arresting or prosecuting the plaintiffs herein or the em-

ployees of the plaintiff Charger Investments, Inc. for violation of that portion of G.L. c. 272, § 16, reading "who is guilty of open and gross lewdness and lascivious behavior" and/or present Chapter 13, Article III of the Revere Revised Ordinances.

Dated at Boston, Massachusetts, this 22 day of November, 1974.

John Peter Connolly
Clerk of Court

Approved
Vincent R. Brogna
JSC

I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON,

December 3, 1975.

IN THE CASE OF

CITY OF REVERE

vs.

ALFONSO AUCELLA & another
(and a companion case)

pending in the Superior Court for the County of Suffolk
No. 1786

ORDERED, that the following entry be made in the docket; viz.,—

The judgment dismissing the city's action with prejudice is affirmed. The judgment in Charger's action is vacated and the case is remanded to the Superior Court, where a new judgment is to be entered in accordance with the opinion.

BY THE COURT,
FREDERICK J. QUINLAN, CLERK.

December 3, 1975.

Brief statement of the grounds and reasons of the decision:
See opinion on file.

A true copy,
Attest:

Frederick J. Quinlan
CLERK.

CITY OF REVERE

vs.

ALFONSO AUCELLA & another

Certified Copy of the Opinion of the Supreme Judicial Court.

S-227 S.J.C.

CITY OF REVERE *vs.* ALFONSO AUCELLA & another [1]
(and a companion case [2]).

Suffolk. September 18, 1975.—December 3, 1975.
Present: Tauro, C.J., Reardon, Braucher, Hennessey, Kaplan, & Wilkins, JJ.

Alcoholic Liquors, Alcoholic Beverages Control Commission. *License. Regulation. Public Entertainment. Revere. Municipal Corporation.* By-laws and ordinances. *Constitutional Law,* Due process of law, Public entertainment, Home Rule Amendment. *Jurisdiction, Civil,* Criminal prosecution, Criminal acts.

TWO CIVIL ACTIONS commenced, respectively, in the Superior Court on July 29, 1974, and in the Supreme Judicial Court for the county of Suffolk on August 21, 1974. On transfer of the second case to the Superior Court, the cases were consolidated and heard by *Brogna, J.,* on statements of agreed facts. The Supreme Judicial Court granted a request for direct appellate review.

Vincent A. Canavan, City Solicitor (*William M. Appel,* Special Assistant City Solicitor, with him) for the City of Revere.

Morris M. Goldings for Alphonso Aucella & another.

---

[1] Charger Investments, Inc.

[2] Charger Investments, Inc. *vs.* Chief of Police of the City of Revere & another.

BRAUCHER, J. These cases test the constitutionality of G.L. c. 272 § 16, prohibiting "open and gross lewdness and lascivious behavior," as applied to a nude "Go-Go" dancer in a bar. They also test the power of a city, by ordinance, to regulate such conduct. We hold that the statute is unconstitutional. *P. B. I. C., Inc.* v. *Byrne,* 313 F. Supp. 757 (D. Mass. 1970), vacated to consider mootness, 401 U.S. 987 (1971). The ordinance, however, is within the powers granted to the city by the Home Rule Amendment, Mass. Const. amend. art. 89, § 6, and the Home Rule Procedures Act, G.L. c. 43B, § 13, and is not on its face inconsistent with our Constitution or laws. We decide no question as to the validity or application of the ordinance in any particular circumstances. Compare *Boston Licensing Bd.* v. *Alcoholic Beverages Control Comm'n,* Mass. (1975),[a] with *Norcisa* v. *Selectmen of Provincetown,* Mass. (1975).[b]

1. *The cases.* The city of Revere sued Charger Investments, Inc. (Charger), doing business as "The Squire," and its manager in the Superior Court to enjoin them from violating Revere Revised Ordinances c. 13, art. 3 (1972) (the ordinance).[3] A preliminary injunction was

[a] Mass. Adv. Sh. (1975) 1608.

[b] Mass. Adv. Sh. (1975) 2032.

[3] Revere Revised Ordinances c. 13, art. 3, § 13-26 through § 13-29 (1972), reads as follows:

"Sec. 13-26. Generally. The following acts or conduct in or on premises licensed in accordance with the General Laws, chapter 140, section 181 or 183A are deemed contrary to the public need and to the common good and therefore no license shall be held for the sale of alcoholic beverages to be served and drunk on the licensed premises where such acts or conduct are permitted.

"(a) It is forbidden to employ or permit any person in or on the licensed premises while such person is unclothed or in such attire as to expose to view any portion of the areola of the female breast or any portion of the pubic hair, cleft of the buttocks, or genitals.

denied. Later Charger, a successor manager and one of its entertainers sued the city and its chief of police in the Supreme Judicial Court for the county of Suffolk to enjoin them from enforcing the ordinance and G.L. c. 272, § 16. A single justice of this court issued a temporary restraining order and transferred the action to the Superior Court. The two actions were consolidated, and were submitted on statements of agreed facts. The judge made findings, rulings and an order for judgment, and judgments were entered dismissing the first action with

"(b) It is forbidden to employ or permit any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire as described in paragraph (a) above.

"(c) It is forbidden to encourage or permit any person in or on the licensed premises to touch, caress or fondle the breasts, buttocks or genitals of any other person.

"(d) It is forbidden to employ or permit any person to wear or use any device or covering exposed to view which simulates the breasts, buttocks, pubic hair or genitals or any portions thereof.

"(e) It is forbidden to employ or permit any person in or on the licensed premises to perform an act or acts, or to simulate the act or acts, of:

"(1) Sexual intercourse, masturbation, sodomy, flagellation or any sexual acts prohibited by law;

"(2) Touching, caressing or fondling of the breasts, buttocks or genitals of another.

"Sec. 13-27. Visual displays. It is forbidden to employ or permit any person in or on the licensed premises to show motion picture films, television type cassettes, still pictures or other photographic reproductions depicting any of the acts, or any simulation of any of the acts, prohibited in section 13-26.

"Sec. 13-28. Violation of other laws. Notwithstanding any of the foregoing, no person duly licensed by the licensing board for the city under General Laws, chapter 140, section 181 or section 183A and/or chapter 138, sections 1, 12 or 23 shall employ, use the services of or permit upon his licensed premises any employee, entertainer or other person who by his or her attire or conduct violates any General Laws, Special Act, or ordinance of the city.

"Sec. 13-29. Effective date. The foregoing amendments shall take effect on March 15, 1974."

prejudice, declaring the statute unconstitutional and the ordinance invalid, and enjoining their enforcement. The city and the chief of police appealed.

2. *The facts.* We summarize the agreed facts. Charger has an alcoholic beverage license under G.L. c. 138 and is licensed under G.L. c. 140, § 183A, to provide entertainment in its eating and drinking establishment, and since 1973 has conducted public shows and sold and served alcoholic beverages to be drunk on the licensed premises. The ordinance in question was passed by the city council and signed by the mayor in March, 1974, and was published in a newspaper in the city on April 3, 1974.

The conduct in issue consists of individual female dancers performing to the accompaniment of rock and roll music, both from phonograph records and from a live band. Each of the dancers, including one of the plaintiffs in Charger's action, removes her clothing while dancing, with the result that she is completely unclothed so as to expose to the view of the customer-consumer all or part of the areas of her body referred to in the ordinance. At no time do the entertainers perform together in proximity with each other. The patrons are charged no admission or cover charge, and are free to leave at any time during any performance without charge other than for the food or drink consumed. A sign located outside the premises bears the word "Entertainers" and the silhouette of a dancing girl.

Beginning in July, 1974, the city brought multiple prosecutions against Charger and its manager and assistant managers for violations of the ordinance, which resulted in convictions and appeals to the Superior Court. Additional prosecutions of its entertainers for violations of G.L. c. 272, § 16, were continued to dates in October, 1974. Further prosecution was enjoined on September 17, 1974.

3. *Lewdness.* The judge ordered a declaration that "the wording of G.L. c. 272, § 16, reading 'who is guilty of open and gross lewdness and lascivious behavior' is unconstitutional," and enjoined the arrest and prosecution of Charger and its coplaintiffs and employees for violation of that statute. With a minor modification we approve that part of the judgment on the ground stated by the judge, that the part of the statute applicable to this case is "too vague and overbroad for the purpose of imposing criminal liability." Cf. *Commonwealth* v. *Horton,* Mass. , (1974),[c] holding unconstitutional G.L. c. 272, § 28A, as to "obscene, indecent or impure" magazines; *Commonwealth* v. *Capri Enterprises, Inc.,* Mass. , (1974),[d] holding unconstitutional G.L. c. 272, § 32, as to a "lewd, obscene, indecent, immoral and impure" motion picture film; *Commonwealth* v. *A Juvenile,* Mass. , (1975),[e] holding unconstitutional G.L. c. 272, § 53, as to "idle and disorderly persons," when applied to speech or expressive conduct. Section 16 was held unconstitutional as applied to a theatrical production in *P. B. I. C., Inc.* v. *Byrne,* 313 F. Supp. 757 (D. Mass. 1970), vacated to consider mootness, 401 U.S. 987 (1971). Like the judge, we do not pass on the application of the statute to the imposition of lewdness or nudity on an unsuspecting or unwilling person. Cf. *Commonwealth* v. *Dickinson,* 348 Mass. 767 (1964); *Commonwealth* v. *Cummings,* 273 Mass. 229, 231 (1930). We sanctioned an injunction against prosecution of entertainers under the same statute in *P. B. I. C., Inc.* v. *District Attorney*

[c] Mass. Adv. Sh. (1974) 599, 607.

[d] Mass. Adv. Sh. (1974) 615, 616.

[e] Mass. Adv. Sh. (1975) 2766, 2776.

of Suffolk County, 357 Mass. 770 (1970). Cf. *Doran* v. *Salem Inn, Inc.,* U.S. , (1975).[f] Multiple prosecutions make it clear that Charger could not eliminate the threat to its constitutional rights by defending against a single criminal prosecution. Cf. *Norcisa* v. *Selectmen of Provincetown,* Mass. , (1975),[g] *Kenyon* v. *Chicopee,* 320 Mass. 528, 535 (1946); *Byrne* v. *Karalexis,* 401 U.S. 216, 220 (1971).

4. *Validity of the ordinance.* The judge found and ruled that the enactment of the ordinance was procedurally proper, but ordered that it be declared "invalid and null and void" on two grounds. First, the power to promulgate such regulations has been granted to the Alcoholic Beverages Control Commission; the field has thus been preëmpted, and cities and towns may not interfere. Second, the ordinance prescribes new terms and conditions on which licenses shall be revoked or denied; if any local agency has the power to make such regulations, it is the Revere licensing board and not the Revere city council.

We rejected the first ground in *Boston Licensing Bd.* v. *Alcoholic Beverages Control Comm'n,* Mass. , - (1975).[h] The second ground, however, requires an examination of the Home Rule Amendment, art. 89 of the Amendments to the Constitution of Massachusetts, and the respective statutory powers of the city council and the city licensing board. We begin with the Constitution, which authorizes the ordinance unless it exercises a power or function which is "inconsistent with the constitution or laws enacted by the general court" or is "denied, either expressly or by

[f] 95 S. Ct. 2561, 2566 (1975).

[g] Mass. Adv. Sh. (1975) 2032, 2047.

[h] Mass. Adv. Sh. (1975) 1608, 1617-1620.

clear implication, to the city or town by its charter."[4] The same broad authority, with the quoted limitations, also appears in G.L. c. 43B, § 13 (as appearing in St. 1966, c. 734, § 1). Cf. G.L. c. 40, §§ 1, 21. Our attention has not been directed to any relevant provision of the city charter, so the question is whether the ordinance is "inconsistent with the constitution or laws." See *Bloom* v. *Worcester,* 363 Mass. 136, 155-157 (1973).[i]

Apart from the laws pertaining to the Alcoholic Beverages Control Commission, Charger's argument as to inconsistent laws rests on G.L. c. 138, §§ 1, 12, 23, and G.L. c. 140, §§ 1, 183A, authorizing local licensing boards to prescribe "reasonable requirements" and "terms and conditions" of the licenses in question. That authority, Charger argues, is "inconsistent" with a grant of the same authority to the mayor and city council, citing *Mosey Cafe, Inc.* v. *Licensing Bd. of Boston,* 338 Mass. 199 (1958), and *Mosey Cafe, Inc.* v. *Mayor of Boston,* 338 Mass. 207 (1958). We are inclined to agree that the local licensing board derives its authority directly from the Commonwealth and cannot be controlled in its exercise by local ordinances. See *MacDonald* v. *Superior Court,* 299 Mass. 321, 324 (1938).

[4] Article 89, § 6, reads: "*Governmental Powers of Cities and Towns.* Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three."

[i] Mass. Adv. Sh. (1973) 291, 307-310.

That does not end the matter, however. In *Bloom* v. *Worcester,* 363 Mass. 136, 156 (1973),[j] we said: "If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject." We there quoted a statement that in the absence of clear statutory limitation a municipality may act "unless the state legislation so broadly encompasses the field as to indicate a clear intention to preëmpt the matter as an area of complete state concern . . . ." *Id.* at 156, n. 15,[k] quoting from E. A. Gere & M.P. Curran, Home Rule (Bureau of Pub. Affairs, Boston College and Bureau of Gov't Research, Univ. of Mass.) 36. See *Lancaster* v. *Municipal Court of the Beverly Hills Judicial Dist. of Los Angeles County,* 6 Cal. 3d 805, 808 (1972).

The State legislation in issue here is not so broadly encompassing. Local licensing boards have power to make regulations governing the conduct of the licensed business, and to modify, suspend, revoke or cancel licenses in order to enforce their regulations. G.L. c. 138, § 23; c. 140, § 183A. Violations of the regulations may be punished by fine and imprisonment. G.L. c. 138, § 62; c. 140, § 183C. But the responsibilities of the licensing authorities are limited to licensing. Even as to licensees, criminal enforcement of regulations of local authorities is the responsibility of others, and there is no provision for enforcement against employees, patrons and others who are not licensees. Although the challenged ordinance is phrased in terms forbidding the holding of a license, it is directly enforceable only by fines; it does not, and in-

[j] Mass. Adv. Sh. (1973) 291, 309.

[k] Mass. Adv. Sh. (1973) at 309, n. 15.

deed could not, make provision for the modification, suspension, revocation or cancellation of any license. The municipal authorities other than the licensing board are not barred from dealing with "the maintenance of the peace and good order" in the city even though statutory provision exists for some matters within the purview of the ordinance. *Commonwealth* v. *Baronas,* 285 Mass. 321, 323 (1934). See *Commonwealth* v. *Wolbarst,* 319 Mass. 291, 294 (1946); *People* v. *Mueller,* 8 Cal. App. 3d 949, 954 (1970); *Cranberry Lake Quarry Co.* v. *Johnson,* 95 N.J. Super. 495, 509 (App. Div. 1967). Although we have held G.L. c. 272, § 16, unconstitutional, it seems clear that the Legislature did not regard its application to conduct in licensed premises as inconsistent with the licensing system. We conclude that the ordinance is not "inconsistent with . . . laws enacted by the general court."

5. *Constitutional questions.* We read § 13-26 of the ordinance[5] as applying only to "licensed premises" subject to a license "for the sale of alcoholic beverages to be served and drunk on the licensed premises" as well as to a license "in accordance with Chapter 140, Sec. 181 or Sec. 183A." We read § 13-27 as similarly limited, and we read § 13-28 as forbidding nothing which is not forbidden by some law or ordinance other than that section. So read, the ordinance is not unconstitutional on its face. *California* v. *LaRue,* 409 U.S. 109 (1972). See *Boston Licensing Bd.* v. *Alcoholic Beverages Control Comm'n,* Mass. , - (1975).[l] Contrast *Salem Inn, Inc.* v. *Frank,* F. 2d , (2d Cir. 1975).[m] As in

[5] See n. 3, *supra.*

[l] Mass. Adv. Sh. (1975) 1608, 1614-1617.

[m] No. 75-71001. (2d. Cir. Aug. 28, 1975).

the *Boston Licensing Bd.* case, we think we should not anticipate constitutional and other questions which may arise from particular applications of the ordinance.

6. *Enforcement by injunction.* Both by statute and by express provision of the Revere ordinances, violation of the ordinance is punishable by a fine of not more than $50 for each offense. G.L. c. 40, § 21. Revere Rev. Ordinances § 1-7 (1972). The ordinances provide that each day any violation continues constitutes a separate offense, but the city contends that the statutory fine is so low as, in effect, to be a "business expense" for a bar providing entertainment in violation of the ordinance, "a cheap license fee" easily covered by a modest increase in the charge for each drink. Therefore, it says, to make the ordinance "meaningful," equitable relief is called for. In the absence of express statutory authority, equitable relief is not ordinarily available to restrain violations of criminal statutes. See *Massachusetts Soc'y of Optometrists* v. *Waddick,* 340 Mass. 581, 585 (1960); *Commonwealth* v. *Stratton Fin. Co.,* 310 Mass. 469, 474 (1941); J. R. Nolan, Equitable Remedies § 36 (1975). Cf. *Norcisa* v. *Selectmen of Provincetown,* Mass. , (1975).[n] We think that we should not sanction equitable relief as a means of circumventing the limitations placed by the Legislature on the punishment for violation of a city ordinance. The city's remedy for violations of the ordinance is clearly prescribed. We do not now undertake to consider what steps, if any, the city may take if that remedy is ineffective.

7. *Conclusion.* The judgment dismissing the city's action with prejudice is affirmed. The judgment in Charger's action is vacated and the case is remanded to the Superior Court, where a new judgment is to be entered (1)

[n] Mass. Adv. Sh. (1975) 2032, 2040.

declaring that the wording of G.L. c. 272, § 16, reading "who is guilty of open and gross lewdness and lascivious behavior," is unconstitutional where there is no imposition of the behavior on an unsuspecting or unwilling person, (2) declaring that art. 3 of c. 13 of the Revere Revised Ordinances is not invalid on its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance, and (3) enjoining the defendants from arresting or prosecuting the plaintiffs or the employees of Charger for violation of G.L. c. 272, § 16, in circumstances in which the statute has thus been declared unconstitutional.

So ordered.

KAPLAN, J. (with whom Tauro, C.J., joins, dissenting in part). I believe the city council should be held to be without power to enact this ordinance. It is aimed at controlling the manner of carrying on a licensed business. That subject matter has been confided by a comprehensive State statute to a local licensing board and the Alcoholic Beverages Control Commission.

Immediately suggestive of a trespass by the city council on the province of the local board and State commission is the fact that § 13-26 of the ordinance states that "no license shall be held for the sale of alcoholic beverages to be served and drunk on the licensed premises where . . . [the listed] acts or conduct are permitted." Then we have the more striking fact that the ordinance is nearly the same word for word as the regulations which were promulgated by the Boston licensing board and were found by this court to be within the subject matter competence of that local board for the very reason, as we said, that they were in the scope of " 'reasonable requirements' with respect to 'the conduct of business by any licensee.' " *Boston Licensing Bd.* v. *Alcoholic Beverages*

Control Comm'n, Mass. , (1975),[a] quoting from G.L. c. 138, § 23, as amended through St. 1971, c. 477, § 3. The prohibitions of the ordinance, like those of the regulations in the Boston case, are directed solely against the management with respect to conditions on the licensed premises; the ordinance does not forbid or punish any act by employees, patrons, or performers. Violations of the ordinance by the licensee are punishable by fine; so also violation of license regulations may result in a fine. See G.L. c. 138, § 62.[1] So it seems to me that to uphold the authority of the city council to enact the present ordinance is to validate the exercise of redundant and "inconsistent" power by the council against the intent of the Home Rule Amendment.

In this light it is perhaps unnecessary to point out that the ordinance interferes with that interaction and balancing of local and State policies envisaged by the State statute. If a licensee is aggrieved by the action of the local board in modifying, suspending, revoking, or cancelling his license as a result of a violation of license regulations, he may appeal to the commission; if the commission disapproves of the action it can remand the matter to the local board for further action; and if the local board fails to take the action recommended by the commission, the licensee may appeal again to the commission, which can then, after hearing, within certain

[a] Mass. Adv. Sh. (1975) 1608, 1618.

[1] Violation of a license regulation may result in the modification, suspension, revocation, or cancellation of a license, see G.L. c. 138, § 64, whereas violation of the ordinance does not have that effect unless, indeed, § 13-26 of the ordinance is read in an imperative way. The record suggests, however, that the city council may seek to use the violation of the ordinance (and, presumably, the declaration of § 13-26) as means of exerting pressure on the local board to take action against the license.

limits issue a final decision. See G.L. c. 138, § 67. The ordinance is disruptive of this scheme of adjustment and in this sense, also, is "inconsistent."

The conclusion of a lack of power in the city council is reinforced when we consider that the ordinance enters the field of censorship. For this a quite clear warrant of authority to legislate should be demanded. I do not think the city council can make the required showing.

But if the ordinance is not unauthorized for the reasons given, I would still hold it to be unconstitutional on its face as to its substance (a claim not disposed of in the Boston case). The case of *California* v. *LaRue,* 409 U.S. 109 (1972) (a six to three decision), may go far to foreclose a claim to that effect under the Federal Constitution, but as I suggested, concurring in *Commonwealth* v. *Horton,* Mass. , (1974),[b] our own Declaration of Rights remains as an additional safeguard of the civil rights. On grounds of "overbreadth," if nothing else, the ordinance seems to me offensive to the guaranty of art. 16. Cf. Marshall, J., dissenting in the *LaRue* case, 409 U.S. at 123; *Salem Inn, Inc.* v. *Frank,* F. 2d (2d Cir. 1975).[c]

Commonwealth of Massachusetts.

Boston, March 22, 1976

I certify *the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of* CITY OF REVERE *vs.* ALFONSO AUCELLA & another *decided on the 3rd. day of December, 1975*

[Illegible.]

Reporter of Decisions.

[b] Mass. Adv. Sh. (1974) 599, 613.

[c] No. 75-7101 (2d Cir., August 28, 1975).

16

A TRUE COPY OF JUDGMENT DULY ENTERED ON Jan. 9, 1976
N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET JANUARY 9, 1976
PURSUANT TO MASS.R.CIV.P. 58(b) AND NOTICE SENT
TO PARTIES PURSUANT TO MASS.R.CIV.P. 77(d) AS FOLLOWS:

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1786

CHARGER INVESTMENTS, INC.
d/b/a THE SQUIRE, AND OTHERS
Plaintiff(s)
v.
GEORGE CORBETT, CHIEF OF POLICE OF THE CITY OF REVERE, AND ANOTHER
Defendant(s)

JUDGMENT AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P.28)

This action was appealed to the - *Appeals Court - Supreme Judicial Court - the issues having been duly heard and the Appeals Court having duly issued a rescript, it is ordered and adjudged: (1) the wording of G.L. c. 272, § 16, reading "who is guilty of open and gross lewdness and lascivious behavior," is unconstitutional where there is no imposition of the behavior on an unsuspecting or unwilling person: (2) art. 3 of c. 13 of the Revere Revised Ordinances is not invalid on its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance, and (3) defendants are enjoined from arresting or prosecuting the

plaintiffs or the employees of Charger for violation of G.L. c. 272, § 16, in circumstances in which the statute has thus been declared unconstitutional.

I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk

Dated at Boston, Massachusetts, this 9th day of January, 1976.

THOMAS DORGAN, Clerk
By: [illegible], Asst. Clerk

NOTICE TO PARTIES: PURSUANT TO MASS.R.A.P. 26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUDGMENT.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
No. 1786

CHARGER INVESTMENTS, INC.
d/b/a THE SQUIRE, AND OTHERS, Plaintiffs

v.

CHIEF OF POLICE OF THE CITY OF REVERE,
Defendant

ORDER DIRECTING CLERK TO CORRECT THE RECORD

In the above entitled action, Thomas Dorgan, Clerk of the Suffolk Superior Court for Civil Business, is hereby directed to correct the docket by striking the judgment after rescript entered on January 9, 1976 and entering a corrected judgment after rescript as of the date of this order.

By the Court,
John J. McNaught
Associate Justice of
the Superior Court

Entered: January 20, 1976
1/21/76
V.A.C.
M.A. & G.
M.M. G.

I hereby attest and certify on March 22, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: JOHN PETER CONNOLLY,
asst. clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT
NO. 1786

CHARGER INVESTMENTS, INC.,
d/b/a THE SQUIRE: E. GREGORY SELIS;
JULIE BIESTERFELD
V.
GEORGE P. CORBETT, CHIEF OF POLICE
OF THE CITY OF REVERE and THE
CITY OF REVERE

FINAL JUDGMENT AFTER RESCRIPT

JUDGMENT ENTERED ON DOCKET JANUARY 21 1976 PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P. 58(a) AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P. 77(d) AS FOLLOWS:

1/21/76
V.A.C.
M.A. & G.
M.M.G.

This case came on to be further heard after rescript of the Supreme Judicial Court dated December 3, 1975, and was argued by counsel and thereupon, upon consideration thereof, it is ORDERED that a new Judgment enter as follows:

JUDGMENT

It is Ordered, Adjudged and Declared that:

1. The wording of G.L. c. 272 § 16 reading "who is guilty of open and gross lewdness and lascivious behavior," is unconstitutional where there is no imposition of the behavior on an unsuspecting or unwilling person.

2. Article III of Chapter 13 of the Revere Revised Or-

dinances is not invalid upon its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance.

3. The Defendants are enjoined from arresting or prosecuting the Plaintiffs or the employees of Charger Investments, Inc. for violation of G.L. c. 272 § 16 in circumstances in which the statute has thus been declared unconstitutional.

By the Court,
s/ Vincent R. Brogna
(Brogna, J.)

Entered: January 20, 1976

I hereby attest and certify on March 23, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

THOMAS DORGAN,
Clerk, Superior Civil Court
Suffolk County
By: Catherine M. McGillicuddy,
Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
C. A. No. 1786

CHARGER INVESTMENTS, INC.,
d/b/a THE SQUIRE, ET ALS,
Plaintiff-Appellants
V.
GEORGE CORBETT, CHIEF OF POLICE OF
CITY OF REVERE, ET ALS,
Defendant-Appellees

APPELLANTS' REQUEST FOR CERTIFICATION AND TRANSMISSION OF THE RECORD TO THE SUPREME COURT OF THE UNITED STATES

Now come the Appellants and request, pursuant to Rule 12(1) of the Rules of the Supreme Court of the United States, that the Clerk certify and provide for the transmission of the record in the above-entitled matter to the Supreme Court of the United States.

By its Attorney,
Morris M. Goldings
Mahoney, Hawkes & Goldings
500 Boylston Street
Boston, Massachusetts 02116
(617) 261-2300

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Request for Certification and Transmission of the Record to the Supreme Court of the United States was served upon Vincent A. Canavan, City Solicitor, City of Revere, Revere, Massachusetts, Attorney for the Appelles [sic], by depositing same in the United States mails, postage prepaid on the 22nd day of March 1976.

Morris M. Goldings

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
C. A. No. 1786

CHARGER INVESTMENTS, INC.,
d/b/a THE SQUIRE, ET ALS.
Plaintiff-Appellants
V.
GEORGE CORBETT, CHIEF OF POLICE OF
CITY OF REVERE, ET ALS,
Defendant-Appellees

APPELLANTS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Charger Investments, Inc., d/b/a The Squire, E. Gregory Sees and Julie Biesterfeld, the Appellants above-named, hereby appeal to the Supreme Court of the United States from part of Final Judgment After Rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts entered on January 21, 1976. The part of said judgment appealed from reads as follows:

> "2. Article III of Chapter 13 of the Revere Revised Ordinances is not invalid upon its face, without prejudice to any question which may arise in a prosecution for a particular violation of the ordinance."

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

By its Attorney,

Morris M. Goldings
Mahoney, Hawkes & Goldings
500 Boylston Street
Boston, Massachusetts 02116
(617) 261-2300

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Notice of Appeal to the Supreme Court of the United States was served upon Vincent A. Canavan, City Solicitor, City of Revere, Revere, Massachusetts, Attorney for the Appellees, by depositing same in the United States mails, postage pre-paid on the 22nd day of March 1976.

Morris M. Goldings

G.L. c. 138, §§ 1, 12, 23, 24, 62.

§ 1. [Definitions.]

The following words as used in this chapter, unless the context otherwise requires, shall have the following meanings:—

"Commission", the alcoholic beverages control commission established under section forty-three of chapter six.

"Alcoholic beverages", any liquid intended for human consumption as a beverage and containing one half of one per cent or more of alcohol by volume at sixty degrees Fahrenheit.

"Wines", all fermented alcoholic beverages made from fruits, flowers, herbs or vegetables and containing not more than twenty-four per cent of alcohol by volume at sixty degrees Fahrenheit, except cider containing not more than three per cent, or containing more than six per cent, of alcohol by weight at sixty degrees Fahrenheit.

"Malt beverages", all alcoholic beverages manufactured or produced by the process of brewing or fermentation of malt, with or without cereal grains or fermentable sugars, or of hops, and containing not more than twelve per cent of alcohol by weight.

"Alcohol", all alcohol other than denatured alcohol or alcohol described in section three hundred and three A of chapter ninety-four.

"Hotel", a building or part of a building owned or leased and operated by a person holding a duly issued and valid license as an innholder, under the provisions of chapter one hundred and forty and provided with adequate and sanitary kitchen and dining room equipment and capacity for preparing, cooking and serving suitable food for its guests, including travelers and strangers and

its other patrons and customers, and in addition meeting and complying with all the requirements imposed upon innholders under said chapter one hundred and forty.

"Restaurant", space, in a suitable building, leased or rented or owned by a person holding a duly issued and valid license as a common victualler under the provisions of said chapter one hundred and forty, and provided with adequate and sanitary kitchen and dining room equipment and capacity for preparing, cooking and serving suitable food for strangers, travelers and other patrons and customers, and in addition meeting and complying with all the requirements imposed upon common victuallers under said chapter one hundred and forty. No advertising matter, screen, curtain or other obstruction which, in the opinion of the licensing authorities, prevents a clear view of the interior of a restaurant shall be maintained in or on any window or door thereof after the said authorities have ordered the removal of such obstruction and have afforded the licensee thereof a reasonable opportunity to remove the same.

"Club", a corporation chartered for any purpose described in section two of chapter one hundred and eighty, whether under federal or state law, including any body or association lawfully operating under a charter granted by a parent body so chartered, and including also any organization or unit mentioned in clause twelfth of section five of chapter forty, owning, hiring, or leasing a building, or space in a building, of such extent and character as may be suitable and adequate for the reasonable and comfortable use and accommodation of its members; provided, that its affairs and management are conducted by a board of directors, executive committee, or similar body chosen by the members at its annual meeting, and that no member or any officer, agent or employee of the club is paid, or

directly or indirectly receives in the form of salary or other compensation, any profits from the disposition or sale of alcoholic beverages beyond the amount of such salary as may be fixed and voted annually within two months after January first in each year by the members or by its directors or other governing body and as shall in the judgment of the local licensing authorities and the commission be reasonable and proper compensation for the services of such member, officer, agent or employee. Such club shall file with the local licensing authorities and the commission annually within three months after January first in each year a list of the names and residences of its officers, together with the amount of salary or compensation received by each employee engaged in the handling or selling of alcoholic beverages.

"Local licensing authorities", the licensing boards and commissions established in any city or town under special statute or city charter or under section four or corresponding provisions of earlier laws, or, in a city having no such board or commission or having a board rendered inactive under section eight, the aldermen, or, in a town having no such board or commission, the selectmen.

"Licensing authorities", the commission or the local licensing authorities, or both, as the case may be.

"Tavern", an establishment where alcoholic beverages may be sold, as authorized by this chapter, with or without food, to be served to and drunk by patrons in plain view of other patrons, all entrances to which shall open directly from a public way. The business conducted therein shall be open to public view from the sidewalk level and the establishment shall be properly lighted. No window facing a public way shall be obstructed by any screen or other object extending more than five feet above the level of the sidewalk on which the establishment abuts, but in no event

shall any screen or obstruction prevent a clear view of the interior of said tavern.

§ 12. [Licenses authorizing sale of beverages to be drunk on premises; veterans' organizations, corporations, etc.; suspension or revocation; hours of sale.]

A common victualler duly licensed under chapter one hundred and forty to conduct a restaurant, an innholder duly licensed under said chapter to conduct a hotel and a keeper of a tavern as defined by this chapter, in any city or town wherein the granting of licenses under this section to sell all alcoholic beverages or only wines and malt beverages, as the case may be, is authorized by this chapter, subject however, in the case of a tavern, to the provisions of section eleven A, may be licensed by the local licensing authorities, subject to the prior approval of the commission, to sell to travelers, strangers and other patrons and customers not under eighteen years of age, such beverages to be served and drunk, in case of a hotel or restaurant licensee, only in the dining room or dining rooms and in such other public rooms or areas of a hotel as the local licensing authorities may deem reasonable and proper, and approve in writing; provided, that no tavern license shall be granted to the holder of a hotel license hereunder. Such sales may also be made, by an innholder licensed hereunder, to registered guests occupying private rooms in his hotel, and in the dining room or dining rooms and in such other public rooms or areas of buildings on the same premises as the hotel and operated as appurtenant and contiguous to and in conjunction with such hotel, and to registered guests occupying private rooms in such buildings. Such sales may be made by a restaurant licensee at such stands or locations in a sports arena, stadium, ball park, race track, auditorium or in any one building

at an airport as the local licensing authority may deem reasonable and proper, and approve in writing. Upon an application for a restaurant license, the local licensing authorities may in their discretion grant such a license authorizing the sale of alcoholic beverages on all days of the week or one authorizing such sale on secular days only, and the decision of such authorities as to which of the two types may be granted upon any particular application shall be final. During such time as the sale of such alcoholic beverages is authorized in any city or town under this chapter, the authority to grant innholders' and common victuallers' licenses therein under chapter one hundred and forty shall be vested in the local licensing authorities; provided, that if a person applies for the renewal of both a common victualler's license or an innholders' license under said chapter one hundred and forty and a hotel or a restaurant license, as the case may be, under this section and the local licensing authorities refuse to grant said common victualler's or innholder's license or fail to act on the applications therefor within a period of thirty days, such applicant may appeal therefrom to the commission in the same manner as provided in section sixty-seven and all the provisions of said section relative to licenses authorized to be issued by local licensing authorities under this chapter shall apply in the case of such common victualler's license or innholder's license.

If a license granted under this section to a person holding a license as an innholder or common victualler is suspended or revoked for any particular cause, no action shall be taken on account thereof by such authorities with respect to such innholder's or common victualler's license prior to the expiration of the period provided for an appeal under section sixty-seven in case no such appeal is taken, or prior to the disposition of any such appeal so taken, nor thereafter, except for further cause, in case

such disposition is in favor of the appellant. Any club in any city or town wherein the granting of licenses to sell alcoholic beverages, or only wines and malt beverages, as the case may be, is authorized under this chapter may be licensed by the local licensing authorities, subject to the approval of the commission, to sell such beverages to its members only, and also, subject to regulations made by the local licensing authorities, to guests introduced by members, and to no others.

The local licensing authorities of any city or town wherein the granting of licenses under this section to sell all alcoholic beverages or only wines and malt beverages, as the case may be, is authorized by this chapter, may, subject to the approval of the commission and irrespective of any limitation of number of licenses contained in section seventeen, issue a license to any corporation the members of which are war veterans and which owns, hires or leases in such city or town a building, or space in a building, for the use and accommodation of a post of any war veterans' organization incorporated by the Congress of the United States, to sell such beverages to the members of such post only, and also, subject to regulations made by the local licensing authorities, to guests introduced by such members and to no others.

The local licensing authorities may determine in the first instance, when originally issuing and upon each annual renewal of licenses under this section, the amount of the license fee, in no case less than two hundred and fifty nor, except as hereinafter provided, more than seven hundred and fifty dollars for a tavern license or twenty-five hundred dollars for any other license under this section for the sale of all alcoholic beverages, and in no case less than one hundred dollars, nor, except as hereinafter provided, more than five hundred dollars for a tavern license

or one thousand dollars for any other license under this section for the sale of wines and malt beverages, or either; provided, that the minimum license fee in the case of a club license for the sale of all alcoholic beverages shall be one hundred dollars; and provided, further, that nothing herein shall prevent such authorities from establishing license fees differing in amounts within the limitations aforesaid for restaurant licenses authorizing the sale of alcoholic beverages on all days of the week and for restaurant licenses authorizing such sale on secular days only. If different license fees are so established the fee for licenses authorizing the sale of alcoholic beverages on all days of the week shall not be more than twenty-five per cent higher than the fee for licensing such sale on secular days only. Before issuing a license to any applicant therefor under this section, or before a renewal of such license, the local licensing authorities shall cause an examination to be made of the premises of the applicant to determine that such premises comply in all respects with the appropriate definition of section one and that the applicant is not less than eighteen years of age and a person of good character in the city or town in which he seeks a license hereunder. No license shall be issued to any applicant who has been convicted of a violation of a federal or state narcotic drugs law.

The local licensing authorities may accept the surrender of a license issued under this section and may issue in place thereof to the same licensee any other form of license authorized under this section, and may allow as a credit on the fee for the new license the license fee paid for the license surrendered but no refund shall be authorized. Different licenses issued as aforesaid for any portion of the same license year to the same licensee shall count as one license for the purposes of section seventeen.

The hours during which sales of such alcoholic beverages may be made by any licensee as aforesaid shall be fixed by the local licensing authorities either generally or specially for each licensee; provided, that no such sale shall be made on any secular day between the hours of two and eight o'clock antemeridian and that, except as provided in section thirty-three, no such licensee shall be barred from making such sales on any such day after eleven o'clock antemeridian and before eleven o'clock postmeridian, and no tavern shall be kept open on any such day between one o'clock antemeridian and eight o'clock antemeridian; and provided further, that any such licensee and his employees may remain on the licensed premises for one hour after the closing hour fixed by the local licensing authority for the purpose of closing the business in an orderly manner. The licensing authority shall not decrease the hours during which sales of such alcoholic beverages may be made by any licensee until after a public hearing concerning the public need for such decrease; provided, that any licensee affected by such change shall be given two weeks notice of such public hearing.

No person, firm, corporation, association or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person, or any subsidiary whatsoever, licensed under the provisions of section fifteen, eighteen or nineteen shall be granted a license under this section.

No licensee under this section, or any employee of such licensee, shall serve any alcoholic beverage to any customer or other person in the licensed premises without charge.

In cities and towns which vote to authorize under section eleven the granting of licenses for the sale of all alcoholic beverages, specific licenses may nevertheless be granted under this section for the sale of wines or malt

beverages only, or both. The licensing authorities may refuse to grant licenses under this section in certain geographical areas of their respective cities or towns, where the character of the neighborhood may warrant such refusal.

All malt beverages sold by a licensee under this section containing not more than three and two tenths per cent of alcohol by weight shall be expressly sold as such.

No malt beverage shall be sold on draught from a tap, faucet or other draughting device unless there shall plainly appear on or attached to such device, in legible letters, the brand or trade name of the malt beverage so sold therefrom.

In any city or town wherein the granting of licenses under this section to sell alcoholic beverages or wines and malt beverages is authorized, a person may be granted a general on-premise license by the local licensing authorities, subject to the prior approval of the commission, authorizing him to sell alcoholic beverages without food to patrons and customers subject to all other relevant provisions of this chapter, provided that such beverages shall be sold and drunk in such rooms as the licensing authorities may approve in writing. The annual license fee for such general on-premise license shall be determined by the local licensing authority and shall not be less than five hundred dollars nor more than twenty-five hundred dollars. For the purposes of section eleven an affirmative vote on subdivision A or B shall be considered an authorization for the granting of general on-premise licenses in a city or town.

§ 23. [Nature of licenses and permits; status as property rights; refusal to issue or reissue, revocation, etc.; refund of fee; transfers; death, receivership or bankruptcy of licensee; expiration.]

The terms licenses and permits, wherever employed as substantives in this chapter, are used in their technical sense of a license or permit, transferable only as provided in this chapter, and revocable by the granting authority, the commonwealth, acting through the same officers or agents and under the same delegated authority for any violation of this chapter or any regulation adopted by the commission or local licensing authority consistent with the terms of this chapter after opportunity for a hearing. The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made.

No holder of such a license or permit hereunder shall have any property right in any document or paper evidencing the granting of such license or permit and issued by the licensing authorities, and said authorities, upon the expiration, suspension, revocation, cancellation or forfeiture of such a license or permit shall be entitled upon demand to the immediate possession thereof. The superior court shall have jurisdiction in equity, on petition of the licensing authorities, to enforce this provision.

No license issued under section twelve, fourteen or fifteen, and no certificate of fitness issued under section thirty, shall authorize the sale of any alcoholic beverages other than those purchased from a licensee under section eighteen or nineteen or from a holder of a special permit to sell issued under section twenty-two A; provided, that the holder of a license under section twelve or fifteen may sell alcoholic beverages acquired as the result of the purchase of a warehouse receipt for such beverages if the said receipt was purchased from the holder of a license under section eighteen or nineteen, or from a broker registered under chapter one hundred and ten A who is authorized thereunder to deal in warehouse receipts for alcoholic beverages; and provided, further, that nothing contained in this section shall be construed to authorize a licensee under section twelve or fifteen to import alcoholic beverages into this commonwealth except through the holder of a license issued under section eighteen.

Whenever, in the opinion of the local licensing authorities, any applicant for a license under section twelve, fourteen, fifteen or thirty A fails to establish to their satisfaction his compliance with the requirements of this chapter, or any other reasonable requirements which they may from time to time make with respect to licenses under said sections, respectively, or to the conduct of business by any licensee thereunder, said authorities may refuse to issue or reissue to such applicant any such license; and whenever in their opinion any holder of such a license fails to maintain compliance with this chapter or it appears that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of this chapter, they may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license. Whenever the local licensing authorities deny an application for a new license, refuse to issue a license

or modify, suspend, revoke or cancel a license or deny an application for transfer of location or between persons or change of a description of the licensed premises, the licensing authorities shall mail a notice of such action to the applicant or licensee, stating the reasons for such action and shall at the same time mail a copy of such notice to the commission.

Whenever, in the opinion of the commission, any holder of a license or permit originally issued by it fails to maintain compliance with the requirements of this chapter, or any other reasonable requirements which it may from time to time make with respect to any such license or permit or to the conduct of business by any such licensee or permittee, it may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license or permit. The commission shall mail a notice to any licensee or permittee of any action by it modifying, suspending, revoking or cancelling such license or permit under the provisions of this paragraph stating the reasons for such action and shall at the same time mail a copy of such notice to the local licensing authority which issued such license or permit.

In case of modification, suspension, revocation or cancellation of a license issued by the licensing authorities or of a permit issued by the commission, no abatement or refund of any part of the fee paid therefor shall be made.

The licensing authorities empowered to issue any license or permit may order refunded the whole or any part of the fee for such a license or permit in case of an error in the kind of a license or permit issued, or may order the fee paid for such a license or permit refunded to the applicant if he has withdrawn his application prior to the issuance of the license or permit applied for, or to the licensee or permittee if he has surrendered the li-

cense or permit issued to him and such licensing authorities are satisfied that no right, power or privilege has been exercised thereunder. Any sums ordered refunded as aforesaid shall be paid from any available funds in the treasury of the commonwealth or municipality as the case may be.

Any license issued under this chapter may, upon application pursuant to section fifteen A, be transferred from one location to another or the description of the licensed premises may be changed with the approval of the licensing authorities. No new license fee shall be required; provided, however, the local authorities may in their discretion increase the annual fee already paid by the license holder. The local licensing authorities may transfer a common victualler's or innholder's license issued under chapter one hundred and forty from one location to another if the applicant therefor is also the holder of a license for the sale of alcoholic beverages at the location from which the transfer is sought. If the local licensing authorities of any city or town refuse to grant or fail to act upon an application for a transfer of location of any license as authorized by this section, the applicant therefor may appeal to the commission under section sixty-seven in the same manner as though such authorities had refused to grant or failed to act upon an application for an original license under this chapter, and all the provisions of said section shall apply to such an appeal. Nothing herein contained shall be construed to limit or prevent the transfer from one location to another by local licensing authorities of common victuallers' or innholders' licenses issued under chapter one hundred and forty if the applicant for such a transfer is not the holder of a license for the sale of alcoholic beverages.

Any license under this chapter held by an individual, partnership or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such transfer is in the public interest. If the local licensing authorities determine that an individual, partnership or corporation is not entitled to a transfer as aforesaid of a license granted by them, the applicant for such transfer may appeal to the commission as if such authorities had refused to grant the license to such individual, partnership or corporation upon an original application therefor, and the decision of the commission upon such appeal shall be final.

In the case of the death of an individual holder of any license or permit under this chapter, such license or permit, unless earlier surrendered, revoked or cancelled, shall authorize the executor or administrator of the deceased licensee or permittee to exercise all authority conferred upon such licensee or permittee until the termination thereof. In case of the appointment of a receiver or trustee in bankruptcy or otherwise of a licensee under this chapter, such license, unless earlier surrendered, revoked or cancelled, shall authorize such receiver or trustee to exercise all authority conferred on such licensee until the termination thereof.

Every license and permit granted under the provisions of this chapter, unless otherwise provided in such provisions, shall expire on December thirty-first of the year of issue, subject, however, to revocation or cancellation within its term.

The commission may accept from any licensee or holder of a certificate of compliance under this chapter an offer in compromise in lieu of suspension of any license or certificate of compliance previously suspended by the com-

mission. A licensee or holder of certificate of compliance may petition the commission to accept such an offer in compromise within twenty days following notice of such suspension. The fine in lieu of suspension, when an offer in compromise is accepted, shall be calculated in accordance with the following formula: Fifty per cent of the per diem gross profit multiplied by the number of license suspension days, gross profit to be determined as gross receipts on alcoholic beverage sales less the invoiced cost of goods sold per diem. No such fine, in any event, shall be less than forty dollars a day. Any sums of money so collected by the commission shall be paid forthwith into the general fund of the state treasury.

§ 24. [Regulations; promulgation by commission; approval.]

The commission shall, in accordance with chapter thirty A and with the approval of the governor, make regulations not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of, all and any of its provisions for inspection of the premises and method of carrying on the business of any licensee, for insuring the purity, and penalizing the adulteration, or in any way changing the quality or content, of any alcoholic beverage, for the proper and orderly conduct of the licensed business, for establishing maximum prices chargeable by licensees under this chapter, and regulating all advertising of alcoholic beverages, except such advertising as appears in publications which are circulated to the liquor trade and not to the general public, and shall, with like approval, make regulations governing the labelling of packages of alcoholic beverages as to their ingredients and the respective quantities thereof.

§ 62. [Penalty.]

A violation by any person of any provision of this chapter for which a specific penalty is not provided or a violation by a licensee or permittee of any provision of his license or permit or of any regulation made under authority of this chapter shall be punished by a fine of not less than fifty nor more than five hundred dollars or by imprisonment for not less than one month nor more than one year, or both.

G.L. c. 140, §§ 1, 183A-183D, 184.

§ 1. ["Licensing authorities" defined.]

"Licensing authorities", as used in this chapter, unless a contrary meaning is required by the context, shall mean the boards in Boston and other cities which by special statutes or city charters have the power to issue licenses for innholders or common victuallers, licensing boards appointed under section four of chapter one hundred and thirty-eight in cities which at the municipal election next preceding the first day of January, nineteen hundred and twenty-five, voted to authorize the granting of licenses for the sale of certain non-intoxicating beverages and also in cities wherein by special statutes said boards are vested with all the powers and duties exercised by licensing boards in cities that vote to grant such licenses, the aldermen in all other cities and the selectmen in towns.

§ 183A. [Innholder, victualler, cafe, restaurant, eating or drinking establishment.]

No innholder, common victualler or person owning, managing or controlling a café, restaurant or other eating or drinking establishment shall, as a part of his usual business, offer to view, set up, set on foot, maintain or carry on a concert, dance, exhibition, cabaret or public

show of any description at which food or drink or other refreshment is sold for cash, or in connection with which, after free admission, music or other amusement is provided or furnished upon payment or deposit of money, either as a cover charge or in payment for food, drink or other refreshment, unless and until a license therefor, to be exercised on week days only, has been issued by the licensing authorities, who may upon written application and upon such terms and conditions as they may prescribe, grant such a license for any or all of the purposes hereinbefore described and may, after written notice to the licensee, suspend or, after hearing revoke the same. Licenses granted under this section shall specify the street and number where the licensed business is to be carried on or give some particular description thereof, and shall not protect a licensee who carries on his business in another place. Such licenses, unless sooner revoked, shall expire on December thirty-first of each year. The fee for any such license or for any renewal thereof shall not exceed five dollars, but no fee shall be chargeable for any such license to a person who, for the period covered by such license, is also licensed under section two.

§ 183B. [Repealed by St. 1936, c. 71, § 2.]

§ 183C. [Violation of statute; report of conviction; revocation of charter of corporation.]

Any person described in section one hundred and eighty-three A who engages in a business required to be licensed by said section unless authorized so to do by a license in full force and effect, and any holder of such a license who violates any condition thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or by both. The clerk of the court in which a corporation engaged in such

business is convicted under this section shall forthwith report such conviction to the state secretary, who shall thereupon revoke the charter of such corporation.

§ 183D. [Minimum or "cover" charge; sign posted; penalty.]

No innholder, common victualler or person owning, managing or controlling a cafe, restaurant, or other eating or drinking establishment shall require any person to pay a minimum charge or "cover charge" unless a sign is conspicuously posted at every entrance to any dining room or rooms where such charge is required, in letters no less than one inch in height, stating that a minimum charge or "cover charge" shall be charged and also stating the amount of such charge. Whoever violates this section shall be punished by a fine of not more than fifty dollars.

§ 184. [Entertainments at which alcoholic beverages are sold.]

Whoever offers to view, sets up, sets on foot, maintains or carries on a theatrical exhibition, public show, concert or dance hall exhibition, of any description, at which alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, are sold or exposed for sale with the consent of those who get up, set on foot or otherwise promote such exhibition or show, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than two years, unless such exhibition or show has been duly licensed as provided by section one hundred and eight-one. This section shall not authorize the licensing of the sale of such beverages contrary to law.

Appellate Rule 28.

ENTRY OF JUDGMENT FOLLOWING RESCRIPT

When the rescript from the appellate court sets forth the text of the judgment to be entered, the clerk of the lower court shall, upon receipt of the rescript, prepare, sign and enter the judgment which has been ordered. If the rescript orders settlement of the form of the judgment in the lower court, the clerk of the lower court shall sign and enter the judgment after settlement. Notation of a judgment in the lower court docket constitutes entry of the judgment.

Supreme Court of the United States

October Term, [illegible]

No. [illegible]

[illegible], INC. d/b/a THE SQUIRE, et al.,
Appellants,

v.

[illegible], CHIEF OF POLICE, CITY OF REVERE, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

[illegible] to Dismiss [illegible] Appeal.

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No. 75-1446.

CHARGER INVESTMENTS, INC. D/B/A
THE SQUIRE, ET AL.,
APPELLANTS,

v.

GEORGE P. CORBETT, CHIEF OF POLICE,
CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF
MASSACHUSETTS, SUFFOLK COUNTY.

Motion to Dismiss the Appeal.

The appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appellants' appeal from the final judgment of the Superior Court of Suffolk County, Commonwealth of Massachusetts, after rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts be dismissed on the following grounds:

(1) that such appeal does not present a substantial federal question; and (2) that said final judgment rests on an adequate non-federal basis.

Statement.

This is a direct appeal from the order of the Massachusetts Supreme Judicial Court made on December 3, 1975 (Appellants' Jurisdictional Statement 36). A judgment

in accordance with the order was entered on January 21, 1976, in the Suffolk Superior Court, upholding the validity of art. III of c. 13 of the Revere Revised Ordinances (§§ 13-26, 13-27, 13-28, 13-29), city of Revere, Massachusetts (Appellants' Jurisdictional Statement 23-25); and § 1-6 of the Revere Revised Ordinances as to severability and § 1-7 of said ordinance as to general penalty (Appellants' Jurisdictional Statement 32-33).

On March 11, 1974, the city council of the city of Revere, Massachusetts, passed an ordinance, Revere Revised Ordinances, c. 13, art. III, barring several enumerated activities by local liquor licensees, among these enumerated activities were included utilizing unclothed employees where alcoholic beverages are served and drunk (Appellants' Jurisdictional Statement 23-25). The appellant, Charger Investments, Inc., d/b/a The Squire, licensed under Mass. G.L. c. 138 to sell and serve alcoholic beverages to be drunk on the licensed premises and licensed under Mass. G.L. c. 140, § 183A, to provide entertainment in the eating and drinking establishment, where alcoholic beverages are sold and drunk, violated said ordinance by employing individual female dancers who disrobed so that they were nude in view of the customer-consumers of alcoholic beverages (Appellants' Jurisdictional Statement 29-30, agreed statement of facts, para. 5). Commencing on or about July 24, 1974, the city of Revere brought multiple prosecutions against the appellants for the violation of said ordinance. On August 21, 1974, the appellants filed a complaint in the Supreme Judicial Court for Suffolk County seeking injunctive relief against the appellees' enforcement of the ordinance (appellees included the police chief of the city of Revere and the city of Revere). On September 19, 1974, a single justice of the Supreme Judicial Court for Suffolk County enjoined the appellees from enforcing this ordinance against the appellants and ordered the action transferred to the Superior Court for Suffolk County for speedy trial. The action was so transferred, and on November 22, 1974, the Superior Court for Suffolk County entered a judgment declaring the ordinance invalid, null and void and permanently enjoining the appellees from enforcing same against the appellants. (Appellants' Jurisdictional Statement 33-35).

The appellees filed timely notice of appeal to the Appeals Court of the Commonwealth of Massachusetts, and on March 14, 1975, the Supreme Judicial Court for the Commonwealth of Massachusetts, the state's highest court, ordered direct appellate review by it of the judgment of the Superior Court. On December 3, 1975, the Supreme Judicial Court of the Commonwealth of Massachusetts issued a rescript and opinion vacating the judgment of the Superior Court and ordering that a new judgment be entered in accordance with its opinion (Appellants' Jurisdictional Statement 46-47). The opinion, in part, set forth that art. III of c. 13 of the Revere Revised Ordinances was not invalid upon its face, without prejudice to any question which might arise in a prosecution for a particular violation of the ordinance.

The rescript was filed with the Superior Court for Suffolk County on December 31, 1975, and the Superior Court for Suffolk County entered its final judgment after rescript on January 21, 1976. On March 22, 1976, the appellants filed with the Superior Court for Suffolk County the appellants' notice of appeal to the Supreme Court of the United States and the appellants' request for certification and transmission of the record to the Supreme Court of the United States (Appellants' Jurisdictional Statement 56). The objective of the appeal to the Supreme Court of the United States basically entails the appellants' desire to enjoin the appellees from enforcing against them a municipal ordinance, namely, Revere Revised Ordinances c. 13, art. III,

which prohibits, among other things, employing or permitting any person in or on the licensed premises (where alcoholic beverages are sold, served and drunk) to appear nude (Appellants' Jurisdictional Statement 23-25).

Argument.

The city of Revere maintains that the ordinance in question, Revere Revised Ordinances, c. 13, art. III, does not conflict with the constitutional rights of free speech or free expression and that it follows the regulations set forth in *California* v. *LaRue,* 409 U.S. 109, 93 S. Ct. 390 (1972), i.e., the regulations are restricted to places where alcoholic beverages are served. The constitutionality has been adjudicated by this Court in the *LaRue* case, *supra;* therefore, there is no substantial federal question presented in the appellants' Jurisdictional Statement. The appellants' appeal should be dismissed.

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts is a correct one, and its validity should be deemed controlling and final against any further appellate review. The Massachusetts Supreme Judicial Court, in the present decision, has ruled that, pursuant to the Constitution and laws of the Commonwealth of Massachusetts, the Revere City Council had the authority and power to pass this ordinance (Appellants' Jurisdictional Statement 45). The Massachusetts Supreme Judicial Court in its decision set forth the following: "The ordinance, however, is within the powers granted to the city by the Home Rule Amendment, Mass. Const. amend. art. 89, § 6, and the Home Rule Procedures Act, G.L. c. 43B, § 13, and is not on its face inconsistent with our Constitution or laws" (Appellants' Jurisdictional Statement 38).

The appellants cannot question the Massachusetts Supreme Judicial Court's final interpretation of its Commonwealth's Constitution as to the authority of the Revere City Council to regulate entertainment where alcoholic beverages are sold. Any inconsistency of an ordinance with the Constitution or laws of the Commonwealth of Massachusetts rests with the courts of the Commonwealth in their scrutiny and interpretation of the state's Constitution and laws. The Supreme Judicial Court of the Commonwealth, the highest court in the state, failed to find any inconsistency, and such failure precipitated its finding, conferring upon the Revere City Council the power to enact the contested ordinance.

Precedent dictates that state constitutional interpretation by the highest court of the state is conclusive upon the federal Supreme Court upon writ of error to the state court. *Reinman* v. *Little Rock,* 237 U.S. 171, 35 S. Ct. 511 (1915), *Thomas Cusack Company* v. *Chicago,* 242 U.S. 526, 37 S. Ct. 190 (1917). *Reinman* and *Cusack* concurrently hold the decision of the highest court of a state that a certain municipal ordinance, challenged as repugnant to the federal Constitution, is within the scope of powers conferred by the state legislature upon a municipality, to be conclusive upon the federal Supreme Court on writ of error to the state court. *Hadacheck* v. *Sebastian, Chief of Police of the City of Los Angeles,* 239 U.S. 394, 36 S. Ct. 143 (1915), expands this conclusiveness upon the federal Supreme Court to encompass decisions of the highest court of a state designating municipal ordinances, asserted to violate the federal Constitution as within the city's charter powers and not forbidden by the state Constitution.

Whether certain municipal ordinances challenged as violating the federal Constitution are within the power conferred by the legislature upon a municipal corporation has been held to a question of state law, the decision of which by the highest state court is conclusive upon the federal Supreme Court on writ of error to the state court. *Atlantic*

Coast Line Railroad Company v. *Goldsboro, North Carolina,* 232 U.S. 548, 34 S. Ct. 364 (1914). The decision in the case at bar of the Supreme Judicial Court for the Commonwealth of Massachusetts falls within the purview of the above precedents accordingly. A municipal ordinance was the issue, and its determination by the highest state court to be constitutionally sound under the state constitutional interpretation should cease any further review.

We respectfully submit, therefore, that the appellants present no substantial federal question, and their appeal is on a judgment which rests on an adequate, non-federal basis. The appellants' request for review should be dismissed, and the final judgment of the Superior Court for the Commonwealth of Massachusetts after rescript of the Supreme Judicial Court should be affirmed.

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Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1446.

CHARGER INVESTMENTS, INC. D/B/A
THE SQUIRE, ET AL.,
APPELLANTS,

v.

GEORGE P. CORBETT, CHIEF OF POLICE,
CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS,
SUFFOLK COUNTY.

Appellants' Brief in Opposition to Appellees' Motion to Dismiss.

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v.
GEORGE P. CORBETT, CHIEF OF POLICE, CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

Appellants' Brief in Opposition to Appellees' Motion to Dismiss.

The appellants brought this appeal, pursuant to 28 U.S.C. § 1257 (2), from the final judgment after rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts affirming the validity of art. III of c. 13 of the city of Revere Revised Ordinances. The appellants contend that the ordinance is repugnant to the First and Fourteenth Amendments and unauthorized by the Twenty-first Amendment to the United States Constitution.

The appellees have moved this Court to dismiss the instant appeal on the grounds that such appeal does not present a substantial federal question and that the final judgment appealed from rests on an adequate non-federal basis. Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellants submit this brief in opposition to the appellees' motion to dismiss.

Argument.

1. The State Law Question Decided Below Is Not Adequate to Sustain the Final Judgment.

The state law question decided below was that the Revere Ordinance, *supra,* "is within the powers granted to the City by the Home Rule Amendment, Mass. Const. amend. art. 89, § 6, and the Home Rule Procedures Act, G.L. c. 43B, § 13, and is not on its face inconsistent with our [i.e. Massachusetts] Constitution or laws" (A. 38).[1] The appellants acknowledge that this question is not within this Court's appellate jurisdiction. However, in suggesting that as a result of this ruling, the final judgment rests on an adequate non-federal basis, the appellees misapply the doctrine of the independent adequate state ground. That doctrine is founded upon the necessity of avoiding advisory opinions, *Murdock* v. *Memphis,* 20 Wall (87 U.S.) 590 (1875); *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945), and applies only when the state ground is "broad enough, in itself, to support the final judgment, without reference to the federal question." *Eustis* v. *Bolles,* 150 U.S. 361, 369 (1893). When, however, as here, a municipal ordinance is challenged both as unauthorized under state law *and* as repugnant to the United States Constitution, this Court has appellate jurisdiction over the case even though the former question is unreviewable. Indeed, such was the situation presented in each of the cases cited by the appellees in support of their contention that jurisdiction is lacking in the instant appeal. *Reinman* v. *Little Rock,* 237 U.S. 171 (1915); *Thomas Cusack Company* v. *Chicago,* 242 U.S. 526 (1917); *Hadacheck* v. *Sebastion,* 239 U.S. 394 (1915); *Atlantic Coast Line Railroad Company* v. *Goldsboro, North Carolina,* 232 U.S. 548 (1914).

[1] Appendix to Appellants' Jurisdictional Statement, 38, hereinafter referenced as (A.).

2. The Power of the City of Revere to Promulgate the Instant Ordinance Presents a Federal Question.

In light of the above, the appellees' argument must be taken to mean not that the final judgment in the instant appeal rests on an adequate state ground but that *California* v. *LaRue,* 409 U.S. 109 (1972), settles all federal questions in the case and that the power of the city of Revere to pass the ordinance at issue here is a question subject exclusively to local law, unreviewable in this Court. This argument is without merit. The power of the city of Revere to enact the instant ordinance presents questions arising under the First and Twenty-first Amendments which cannot be disposed of by consideration of local law alone, and which were not decided by *LaRue.*

In *LaRue,* this Court recognized that at least some of the performances proscribed by the regulations at issue there were in themselves within the protection of the First Amendment. *California* v. *LaRue, supra,* 409 U.S. at 116, 118. But in the "context of licensing bars and nightclubs to sell liquor by the drink" it was stated that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.* at 114. On that basis it was held that the California Department of Alcoholic Beverage Control, *"the state*

agency that is itself the repository of the State's power under the Twenty-first Amendment,'' id. at 116, acted within constitutional limits in promulgating the contested regulations (emphasis supplied).

In contrast, in the instant case the Supreme Judicial Court for the Commonwealth of Massachusetts specifically found that the Revere City Council had no authority to grant, modify, suspend, revoke or cancel a local liquor license (A. 44-45). Accordingly, in sustaining Revere's power to enact the ordinance despite the city's lack of licensing authority that Court did not rely upon the powers conferred on the states by the Twenty-first Amendment but characterized the authority behind the ordinance in terms of the normal police power of a city to deal with ''the maintenance of the peace and good order'' (A. 45).

This Court, in its recent decision in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), gave recognition both to the possibility that the power of a city to enact a *LaRue* type ordinance does not exist apart from an expressed delegation of state authority over liquor licenses and to the fact that the issue posed thereby involves a federal question concerning the scope of and interaction between the First Amendment and Twenty-first Amendment. Thus, as the Court noted:

> ''In *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing *as a part of its liquor license program''* (emphasis supplied). 422 U.S. at 932-933.
>
> ''Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue, supra,* if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited.'' 422 U.S. at 933-934.

Hence the issue of the power of the city of Revere to promulgate the instant ordinance cannot be disposed of on state law grounds alone but presents the federal question of whether such ordinance constitutes a permissible exercise of a state's power under the Twenty-first Amendment.

3. The Federal Question Is Substantial.

In their motion to dismiss, the appellees argue that since the Revere ordinance is ''restricted to places where alcoholic beverages are sold,'' questions of its constitutionality were adjudicated in *California* v. *LaRue, supra,* and that therefore no substantial federal question is presented in the instant appeal (appellees' motion to dismiss 4).

LaRue's sanction of regulations of this type, however, is not so broad as the appellees' statement suggests. Lower federal courts have read *LaRue* as leaving First Amendment protection intact for semi-nude barroom performances that do not partake of the ''gross sexuality'' that characterized the entertainment held there to have been validly proscribed. *Clark* v. *Fremont, Nebraska,* 377 F. Supp. 327 (D. Neb. 1974); *Escheat, Inc.* v. *Pierstorff,* 354 F. Supp. 1120 (W.D. Wis. 1973). Thus *Clark* v. *Fremont, supra,* held unconstitutional that part of an ordinance which proscribed the showing of uncovered female breasts, the court concluding that topless dancing *per se* and body painting were not within the range of activities subject to unrestricted regulation under *LaRue.* 377 F. Supp. at 342. Section 13-26 of the Revere ordinance (A. 23-24) on its face also forbids topless dancing and is thus similarly overbroad. See also

Escheat, Inc. v. *Pierstorff, supra,* where the court concluded that "some shows which fall somewhere between Mary Poppins, on the one hand, and 'Bacchanalian revelries,' on the other, even when performed in a bar, continue to be entitled to first amendment protection" (footnote omitted). 354 F. Supp. at 1126.

More importantly, there are in the instant case *no* findings by the state legislature, or municipal or state liquor authority, as there were before this Court in *LaRue,* that the conjunction of the performances proscribed here and the dispensation of liquor by the drink resulted in an increased number of assaults, indecent exposures, attempted rapes or other anti-social behavior. Under these circumstances a substantial question is presented as to whether the Revere City Council was warranted in adopting an across-the-board prophylactic solution of the kind justified by the different circumstances presented in *LaRue.* See *Peto* v. *Cook,* 364 F. Supp. 1, 3 (S.D. Ohio, 1973), *aff'd mem. sub nom Guggenheim* v. *Peto,* 415 U.S. 943 (1974); *Salem Inn, Inc.* v. *Frank,* 381 F. Supp. 859, 863-864 (E.D. N.Y. 1974), *aff'd* 522 F. 2d 1045 (2d Cir. 1975). Indeed, in view of the lack of legal authority in the Revere City Council to license liquor establishments, its enactment of the ordinance now under review seems censorious and political, and not regulatory.

For the foregoing reasons the appellants submit that the questions presented by this appeal are not bereft of substantiality by reason of prior decisions of this Court, *Zucht* v. *King,* 260 U.S. 174 (192[illegible] so as to warrant dismissal of this appeal.

Conclusion.

For the reasons stated the Court should note probable jurisdiction in this case.

Respectfully submitted,

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